

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 14,688

FILED FEB - 3 1959

Joseph W. Stewart

CLERK

ALBERT B. LUCKEY, JR.,

v.

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Appellant,

ARLINE MAE LUCKEY,

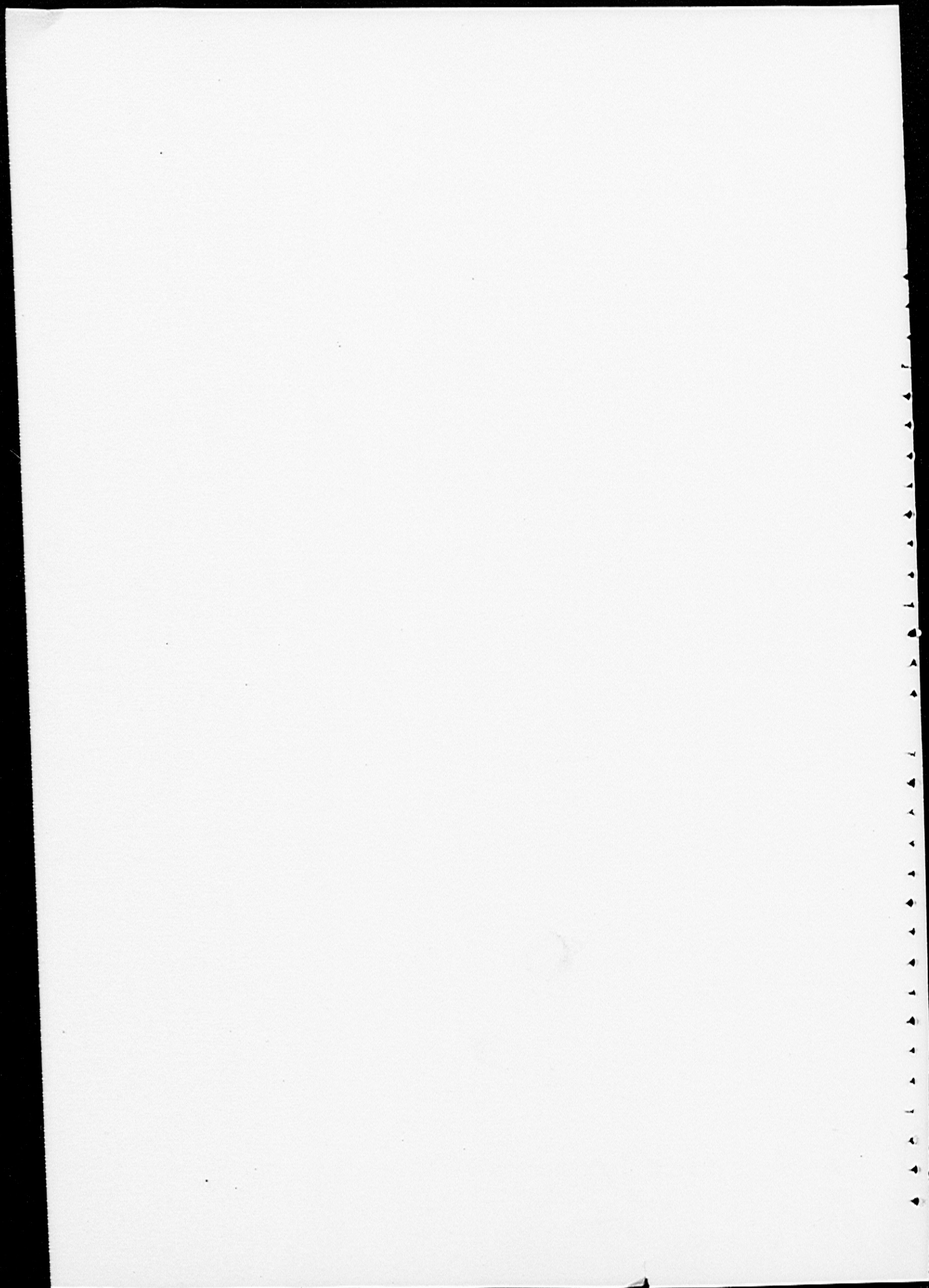
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEO HOWARD KERNS

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Washington, D. C.

Attorney for Appellant.



APPELLANT'S STATEMENT OF QUESTIONS PRESENTED

1. Whether the laws of the State of Florida govern in a case in which the proceeds of a life insurance policy are claimed by two parties, and in which the insured was a resident of Florida, at all times pertinent hereto, the policy was applied for, issued, and delivered in Florida, all premiums were paid in Florida, the insurance company was licensed to do business in Florida, both claimants were residents of Florida at the time of death of insured, and the insured died in Florida.
2. Whether under the laws of the State of Florida the attempted change of beneficiary of a life insurance policy is effective when the insured during his lifetime executed a request for change of beneficiary without producing the policy, which request was not accepted by the insurer and endorsed upon the policy, where the terms of the policy required such acceptance and endorsement.
3. Whether the beneficiary of a life insurance policy is entitled to recover interest, costs and attorneys fees from the insurer when the fund is claimed by adverse claimants and the insurer fails to take any positive action to interplead the adverse claimants until seven months after the death of the insured and twenty six days after one of the adverse claimants instituted suit against the insurer; and further whether under these same facts, the insurer is entitled to recover attorneys fees and costs out of the fund.



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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 14, 688

ALBERT B. LUCKEY, JR.,

Appellant,

v.

ARLINE MAE LUCKEY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

On January 20, 1942, Albert Benjamin Luckey, deceased, made application to the insurer at Miami, Florida, for a policy of insurance on his own life, and on April 19, 1942, policy No. N-1 345 696 in the face amount of \$2,500 was issued pursuant to said application and delivered to him in Florida.

The beneficiaries of said policy as originally issued were "Elsie Luckey, wife of the insured and Albert B. Luckey, Jr., son of the insured, equally, or to the survivor." On April 29, 1942, at Miami,

Florida, the insured requested in writing that the beneficiary be changed to "Albert B. Luckey, Jr., son of the insured, if he survives the insured, otherwise Elsie Luckey, wife of the insured", and said request was accepted by the company on May 4, 1942, and endorsed on the policy as required by the terms of Paragraph 3 of said policy governing the change of beneficiary.

The insured and the said Elsie Luckey were divorced on or about March 26, 1954, and the insured and Arline Mae Luckey, appellee herein, were married at Coral Gables, Florida, on or about April 22, 1954. The insured died in Florida on June 3, 1956. The appellant, Albert B. Luckey, Jr., is the only child of the insured. His mother is the said Elsie Luckey, former wife of the insured, and she is still living. All premiums on the policy were paid by the insured.

On November 24, 1954, the insured went to the office of the insurer in Miami, Florida, and signed and submitted a written request to change the beneficiary of said policy. (Exhibit A, J. A. 9).

On November 24, 1954, the Miami office of the insurer wrote to the Home Office of the company in Hartford, Connecticut, with respect to the request for change of beneficiary and enclosed an affidavit (Exhibit B, J. A. 10) executed by the insured. The affidavit accompanying the request to change the beneficiary stated that the policy was in the hands of insured's former wife. The Home Office replied under date of November 30, 1954, (Exhibit C, J. A. 11) and stated therein "We are enclosing form 1399 on the above policy for what it may be worth. In view of the situation described in your (agents) letter of November 24, all we can do is to hold the beneficiary forms on file until such time as the insured can recover his policy so that the change of beneficiary can be completed. In all probability no settlement of this policy can be made without a release from the former wife and the present wife and son." On or about December 8, 1954, the insured received a letter from the Miami office of the Insurer stating the position

of the company with respect to the request. (Exhibit D, J.A. 12)

Mr. Albert B. Luckey

P. O. Box 22

Islamorada, Florida

Re: N1666239
N1345696

Dear Mr. Luckey:

We are enclosing Policy No. N1666239 on which the beneficiary has been changed.

Regarding the other policy No. N1345696 our reply from the Home Office reads as follows:

"In view of the situation described in your letter of November 24, all we can do is to hold the beneficiary forms on file until such time as the insured can recover his policy so that the change of beneficiary can be completed."

If we can be of further service please let us know.

Very truly yours,
W. B. Arnold, Jr. G/A
By: L. Abercrombie

The matter remained in that status until the death of the insured on June 3, 1956.

The parties herein stipulated that for some time prior to the divorce on March 26, 1954, and from that date until insured's death on June 3, 1956, Elsie Luckey, the former wife, living in Miami, did not see the deceased, did not speak to him either in person or over the telephone, and that she received no communications, written or verbal, from the deceased, and that she sent no communication to him, and that at no time did the deceased request or demand from her the insurance policy in her possession in which their son, the appellant herein, was the named beneficiary.

The insured died on June 3, 1956. The appellant herein filed his claim, accompanied by the policy, with the insurer on June 14, 1956. On June 19, 1956, the insurer notified the appellee herein with carbon copy to appellant herein that the appellee was the beneficiary of Policy N-1666239 but with regard to Policy N-1345696 (the fund herein) "the company (insurer) is unwilling to assume the responsibility of deciding to

whom the proceeds of this policy should be paid." On August 17, 1956, the appellant herein categorically notified the insurer that he would not release his claim as beneficiary of the policy. On August 22, 1956, the insurer notified the appellant herein that it would not pay the claim. Three months passed and the insurer did nothing. On December 13, 1956, the appellant herein instituted suit in the Municipal Court of the District of Columbia against the insurer. On January 8, 1957, the insurer filed its bill of interpleader in the U. S. District Court for the District of Columbia and deposited the fund with the Court. On June 18, 1958, on a Motion for Summary Judgment, the Court below held in favor of Appellee, Arline Mae Luckey, and awarded appellee, Aetna Life Insurance Company, attorneys fees and court costs from the fund on deposit with the Court. This appeal is taken from the ruling of the Court below.

STATUTES INVOLVED

FLORIDA STATUTES ANNOTATED

SECTION 625.08 ATTORNEY'S FEES IN CERTAIN CASES UPON CONTRACTS AND POLICIES OF INSURANCE -- Upon the rendition of a judgment or decree by any of the courts of this state against any insurer in favor of the beneficiary under any policy or contract of insurance executed by such insurer, there shall be adjudged or decreed against such insurer, and in favor of the beneficiary named in said policy or contract of insurance, a reasonable sum as fees or compensation for his attorneys or solicitors prosecuting the suit in which the recovery is had.

The amount to be recovered for fees and compensation for attorneys and solicitors against such insurer shall be ascertained and fixed by the court in chancery cases or a jury in common law actions, from testimony adduced for that purpose, and shall be included in the judgment or decree rendered in such cases.

STATEMENT OF POINTS

1. The law applicable in this case is the law of the State of Florida.
2. The law of the State of Florida applicable herein is that where there is a contract of Insurance and where a change in the beneficiary of a life policy may not take effect without the consent of the Insurer to be evidenced by the endorsement thereof on the contract of Insurance by the insurer, and the change was pending and unfinished when the insured died, the beneficiary listed in the policy becomes vested with the proceeds of the policy immediately upon the death of the insured.
3. When adverse claimants file claims against an insurance company for the proceeds of a life policy and the company takes no positive action for an unreasonable length of time forcing one claimant to file suit in court against the Insurance Company, the Insurance Company is liable for legal rate of interest beginning one month after receipt of notice of adverse claims.
4. Where an insurance company unreasonably refuses to pay the beneficiary of a life policy and unreasonably refuses to interplead adverse claimants until after one claimant is forced to bring suit in Court against the Insurance Company, the Insurance Company is not entitled to court costs and attorneys fees.
5. Where an Insurance Company unreasonably refuses to pay a beneficiary of a life policy and unreasonably refuses to interplead adverse claimants until one claimant is forced to bring suit in court against Insurance Company, the claimant instituting suit is entitled to court costs and reasonable attorneys fee.

SUMMARY OF ARGUMENT

The rule is long established that where all facts pertaining to the issuance of a life insurance policy occur in one State and the policy is delivered in that State, the laws of that State shall apply when there is a contest over the proceeds of the policy. Every transaction regarding the policy at issue herein took place in Florida, therefore the laws of the State of Florida should apply to this case.

Florida law is clear upon the facts presented in this case. The rule of law is that the change of beneficiary of a life insurance policy must be done in strict compliance with the terms and conditions contained in the policy. The terms of the provision for the change of beneficiary of the policy at issue herein were not complied with by the insured, therefore the named beneficiary of the policy became vested with the proceeds at the time of the death of the insured.

Florida law also wisely provides that a beneficiary who recovers from an insurance company after recourse to the Courts is entitled to a reasonable sum, in addition to the proceeds from the policy, as compensation for his attorneys.

On the other hand, an insurance company interpleading two adverse claimants is not entitled to costs and attorneys fees when it acknowledged to its agent eighteen months prior to the death of the insured that there would be two adverse claimants and possibly three and then took no positive steps to protect itself, the insured, and the beneficiary and avoid costly court litigation. This failure to act was due to the Company's belief that costs and attorneys fees would be assessed against the fund to the detriment of the insured and the beneficiary and result in no cost to the Company.

The Company should be charged interest on the fund that it retained in its possession through its wilful refusal to pay the beneficiary in accordance with the terms of the contract of insurance.

ARGUMENT I

The law applicable in this case is the law of the State of Florida.

The insured at the time of applying for the insurance policy and at all times thereafter and at the time of his death, was a resident of the State of Florida. The policy of insurance was applied for, issued and delivered in the State of Florida. The Insurer was licensed to do business in the State of Florida and surrendered itself to the jurisdiction of the Courts of the State of Florida and subjected itself to the laws of the State of Florida. All premiums were paid in the State of Florida. The adverse claimants were both residents of the State of Florida at the time of death of the insured. The insured died in Florida.

It is universally held that under the above facts, the law of the State where the policy was delivered governs. Levin vs. John Hancock Mutual Life Insurance Company, 41 A 2nd 841; Lee vs. New York Life Insurance Company 38 N. E. 2nd 333; Mutual Life Insurance Company vs. Cohen, 179 U.S. 262; and others.

The law of the State of Florida applicable herein is that where there is a contract of insurance, and where a change in the beneficiary of a life policy may not take effect without the consent of the Insurer to be evidenced by the endorsement thereof on the contract of Insurance by the insurer, and the change was pending and unfinished when the insured died, the beneficiary listed in the policy becomes vested with the proceeds of the policy immediately upon the death of the insured.

The landmark Florida case in point is Sheppard v. Crowley (61 Fla. 735, 55 S 841) whereby insured took out a life policy November 22, 1901 with an insurance company. One of the conditions and privileges of said policy was "Change of Beneficiary--This contract is issued with the express understanding that the purchaser may from time to time during its continuance change the beneficiary or beneficiaries by filing with the society a written request duly acknowledged, accompanied by this contract, such change to take effect upon the endorsement of same on this contract by the society, provided it has not been assigned and

notice of such assignment recorded on the books of the society." On October 9, 1908, the insured initiated a request to the Company to change the beneficiary from Crowley to Sheppard. Said request was received by the Company on October 12, 1908, and endorsed upon the policy October 15, 1908. Insured was found dead on October 16, 1908, and the time of death was established as October 14, 1908. The Supreme Court of Florida held that "the change of beneficiary could not take effect at any other time than that agreed upon without the consent of the association. This transaction (attempt to change beneficiary) was pending and unfinished when the insured died, and upon his death the amount of the insurance was payable to his estate (the first beneficiary named in the policy)."

In the instant case the comparable clause is located on Page 2, Paragraph 3, of the Policy and reads as follows:

"3. How beneficiary may be changed.

"The beneficiary may be changed as often as desired by filing a written request therefor at the Home Office of the Company accompanied by the policy for endorsement and such change shall take effect as of the date of execution of such request, without prejudice to the Company on account of any payment made by it before receipt of such request, but only if it has been endorsed upon the policy.

If any beneficiary dies before the insured, the interest of such beneficiary shall rest in the life owner alone unless otherwise provided herein.

It states the same condition and privilege as Sheppard v. Crowley. In 1939, the Supreme Court of Florida held (Warren v. Prudential Insurance Company of America et al, 189 S. 412) that the right of insured to change beneficiary of a life policy depends upon the terms of the contract as between insurer and insured as expressed in the policy, and strict compliance with terms of the policy is required. In effect the Court stated that the insurer and the insured may contract as they see fit, but once contracted, the Court will strictly enforce the provisions thereof. The Court stated: "Sheppard v. Crowley aligns Florida with the States approving a strict construction of the terms of the policy which appears supported by the sounder reasoning." In a 1940 case, Gerstel v. Arens et al (196 S 616) the Supreme Court of Florida stated "It is contended first that in this State the beneficiary cannot be changed except by strict compliance with

the provisions for that purpose contained in the Policy. The rule requiring strict compliance with the provisions in the policy was first adjudicated in Sheppard v. Crowley 61 Fla 735, 55 S 841, and has been followed by this Court ever since. See Garner v. Bemis 81 Fla 60, 87 So. 426."

In Miller v. Gulf Life Insurance Company, 12 So 2nd 127, the Supreme Court of Florida held in 1943, "The privilege given to the insured to change the beneficiary of his policy is in the nature of a power created by his contract with the Company to be exercised by him only in strict accordance with the terms of the instrument creating it. Opitz v. Karel, 118 Wis 527, 95 NW 948. 62 LRA 982, 99 Am St Rep 1004.... This Court is committed to a strict interpretation of policy requirements for change in beneficiaries in life insurance policies of this kind. Sheppard v. Crowley, 61 Fla 735, 55 So 841."

In the instant case, the insured did not comply with the provisions of his insurance contract to effect a change in beneficiary in accordance with the rule set down in Sheppard v. Crowley and the succeeding cases supra. Throughout these cases the Florida Court is not unreasonably rewriting the contract between the insured and the insurer but merely strictly enforcing the contract as it is written. Should the parties so desire, they could insert a provision enabling them to mutually waive certain conditions of the contract should they become burdensome to one of the parties. Such a waiver would be an effective device to circumvent the Sheppard v. Crowley rule. However, in the absense of such a waiver and the exercise of it, the Florida Courts insist upon strict compliance with the terms of the contract.

The most recent Florida case involving this principal is O'Brien v. Elder, 250 F 2 275, decided in the U. S. Court of Appeals for the Fifth Circuit, December 11, 1957. In this case, insured and beneficiary were divorced. At the time of the divorce, insured and beneficiary entered into a property settlement which was incorporated in the decree of divorce in which they relinquished "any claim on the other party of any kind whatsoever." The following year the insured was killed in an accident and the policies found among his personal effects still listed his former wife as beneficiary. It was also shown that each policy had

attached to the envelope containing the policy, a note in the insured's handwriting reminding him to make a new will and "change insurance policy beneficiaries." Finally Plaintiff (administratrix) offered to prove that about a month before insured's death, the insured had arranged to meet one of the affiants so that she could assist him in changing the designation in the policies, but that they had missed each other at the appointed place, and that on the night before his death, the insured again asked the affiant to assist him the following week to change his beneficiary. The Court held that where evidence disclosed that at most only preparations had been made by insured for changing beneficiary, and not that everything was done toward that end reasonably within insured's power, administratrix (Plaintiff) of insured's estate was not entitled to the proceeds of life policies on the theory that Equity will complete a contemplated change of beneficiary if insured has manifested a desire and intent to change beneficiary, although falling short of policy requirements.

In the instant case, insured made only one attempt to change the beneficiary. He was informed that it was necessary to produce the policy with the request to change and he stated that policy was in hands of former wife. It has been stipulated between the parties that the insured did not see, speak to, or communicate with his former wife from prior to their divorce until his death 27 months later. The insured changed the beneficiary on one policy that was in his possession but made no further attempt to secure possession of the policy at issue herein in the hands of his former wife. He did not even ask for it.

By insured's own sworn affidavit made 18 months prior to his death, he states that the policy was last in his possession in 1949, and then "in possession of former wife." Insured was divorced in March of 1954. The affidavit is dated November 24, 1954, and inquiry No. 4 therein states "what efforts have been made to find the policy?" The insured did not respond to this inquiry because no effort had been made

to secure the policy. During the ensuing 18 months prior to his death, the insured made no effort whatsoever to recover the policy. Nonetheless, the insured continued to pay the premiums on the policy prior and subsequent to 1949 including the 18 month period prior to his death. It is unthinkable that the insured would have paid premiums upon a non-existent policy for seven years if he truly believed it to be lost or destroyed. Should that have been the case in 1949 a reasonable man would have requested that the "lost" policy be cancelled, that a new policy be issued and the subsequent premiums be applicable to the new policy. The insured knew that the policy was not lost but was in the possession of his former wife. In 7 years, the insured made only one solitary appeasement attempt to change the beneficiary and then was content to leave the matter alone. This was done even though the Company notified the insured that the attempt to change the beneficiary was not good and a single telephone call or letter to insured's former wife would have produced the policy. The insured, on April 29, 1942, had requested to change the beneficiary from his former wife to his son, the appellant herein, and said request for change of beneficiary was accepted by the Company and endorsed on the policy on May 4, 1942, in compliance with the terms of Par 3 of the policy (supra). The insured was completely familiar with the steps necessary to change the beneficiary yet when the Insurer notified him on December 8, 1954, that his request for change of beneficiary was not acceptable to the insurer, insured made no further attempt to recover the policy or to change the beneficiary.

Without the policy, insured could not comply with the provisions thereof to effect a change of beneficiary and under the rule of Sheppard v. Crawley and cases cited supra, the single attempt to change the beneficiary was not good and the policy vested in the beneficiary stated in the policy on the death of the insured. The only reasonable inference resulting from the conduct of the insured is that he had changed his mind and desired the appellant herein to remain the beneficiary of the policy.

III

When adverse claimants file claims against an insurance company for the proceeds of a life policy and the company takes no positive action for an unreasonable length of time forcing one claimant to file suit in court against the Insurance Company, the Insurance Company is liable for legal rate of interest beginning one month after receipt of notice of adverse claims.

Florida law should govern the question of whether or not claimant is entitled to receive attorneys fees and Court cost from the insurer. In a 1954 case, Republic of China v. Central Scientific Company, 120 Fed. Supp. 924, the U. S. District Court for the Northern District of Illinois held that under the rule vesting discretionary power in Courts with respect to allowance of costs, including attorneys fees, courts are required to consider State law. The law of the State of Florida is clear. FSA 625.08 states:

Upon the rendition of a judgment or decree by any of the courts of this state against any insurer in favor of the beneficiary under any policy or contract of insurance executed by such insurer, there shall be adjudged or decreed against such insurer, and in favor of the beneficiary named in said policy or contract of insurance, a reasonable sum as fees or compensation for his attorneys or solicitors prosecuting the suit in which the recovery is had.

The amount to be recovered for fees and compensation for attorneys and solicitors against such insurer shall be ascertained and fixed by the court in chancery cases or a jury in common law actions, from testimony adduced for that purpose, and shall be included in the judgment or decree rendered in such cases.

Inasmuch as the appellant herein had no knowledge of an adverse claimant and the insurer herein had such knowledge 18 months prior to the death of the insured (Exhibit C; J.A. 11) and appellant herein was

forced to institute legal proceedings against insurer to enforce his claim. The appellant herein should not be liable for his own Court Costs and attorney's fees brought about by the Insurer's negligence and laches.

IV

Where an insurance company unreasonably refuses to pay the beneficiary of a life policy and unreasonably refuses to interplead adverse claimants until after one claimant is forced to bring suit in Court against the Insurance Company, the Insurance Company is not entitled to court costs and attorney's fees.

An insurance company may waive the conditions in an unassigned policy, such as surrender of the policy, or affixing their endorsement of a change of beneficiary upon the policy in cases where the insured claims that a policy is lost and the company is notified of the alleged loss and the insured makes application for a new policy. Jackson v. Leonard, (1929) 169 Ga. 324, 150 S. E. 152; Dunnavant v. Mountain States Life Insurance Company, (1934, Mo. App) 67 S. W. 2d 785. Such a provision is one solely for the protection of the Company, which it may waive if it elects to do so just as it may waive any other provision of the contract made for its benefit. Opitz v. Karel, 118 Wis. 527. In the instant case, the insurance company was notified by the insured of his desire to change his beneficiary and that the original policy was in the possession of his former wife. If the insurance company did not intend to pay the beneficiary in the original policy as required by Florida law, the insurance company was negligent in failing to take positive action in ascertaining who was the proper beneficiary either by waiving the conditions in the policy (which were for the benefit of the company) and issuing a new policy, or informing the insured that the company would pay the beneficiary listed in the original policy notwithstanding the attempted change. The company, by failing to take positive action during the life of the insured when it had full knowledge of the facts, was guilty of non-

feasance inasmuch as the company had a duty to determine to whom it was liable upon the death of the insured. To permit the perpetrator of such laxness and negligence to recover attorney fees from the fund deposited into court by way of interpleader puts a premium on mismanagement and ineptitude. The condonation of such action by the Court if it were to allow attorney's fees in such a case would have the effect of encouraging the violation of a duty by the Company. By interpleading the adverse parties the Company is suffering no loss or damage for its negligence but is in fact profiting thereby in two ways.

First the Company has use of the fund for an additional period of time (i.e. from the time of death until interpleader is filed and the fund is deposited with the registry of the Court.)

Secondly, the Company avoids any penalty for its laxness by having the additional costs incurred assessed against the fund, to the detriment of the beneficiary thereof. The insurance contract provides that in consideration for the premiums paid by the insured, the Company will pay a certain sum to the named beneficiary upon the death of the insured. Yet when the Company interpleads and requests costs and attorney fees from the fund, it is asking the Court to pay an ordinary business expense (attorney's fees) caused by its own negligence from a fund created by a blameless insured and vested in a blameless beneficiary.

The Company was on notice in the instant case 18 months prior to the death of the insured that there would be adverse claimants. In the letter from the Home Office to the Company's agent, dated November 24, 1954, (Exhibit C; J.A. 11) the Company stated "In all probability no settlement of this policy can be made without a release from the former wife and the present wife and son."

There is authority for the proposition that where the party interpleading claimants to funds or property is himself responsible for the existence of the conflicting claims, he is not entitled to an allowance

for attorney's fees incurred in interpleading the claimants. 48 A.L.R. 2d 219. Attorney's fees were refused in a case where the Company was aware that the insured's former wife was in possession of the original policy and the company had the opportunity to ascertain whether she claimed ownership of the policy. Continental Life Insurance Company v. Sailor, 47 F. 2d 911. No attorney's fees were allowed when agent of the Company failed to forward a request for change of beneficiary to the Home Office, Union Mutual Life Insurance Company v. Lindamood, 108 W. Va. 594, 152 S. E. 321. Where Company's agents were negligent in failing to procure the necessary beneficiary change forms, the Court held that since the litigation was not caused by the fault of either claimant, but was chargeable to the Insurance Company through the fault of its agents, the Company was not entitled to attorneys fees out of the proceeds of the policy. Provident Life & Accident Insurance Company v. Dotson, 93 F. Supp. 538. See McKinnon v. Reliance Insurance Company, 113 Fla. 370, 151 So. 699; Texas State Bank and Trust Company v. Potee, 111 S. W. 2d 1157; Pettus v. Hendricks, 113 Va. 326, 74 S. E. 191.

In addition to its negligence in failing to determine to whom it was liable even though it had ample opportunity to do so, the Company herein refused payment to either claimant and took no positive action toward settlement and/or interpleader until the appellant herein brought an action in Court to compel performance with the terms of the policy. This was seven months after the death of the insured. In N. Y. Life Insurance Company v. Bidoggia, 15 Fed. 2d 126, it was held that where an insurance company did not bring its bill of interpleader until almost six months after the death of the insured and not until the beneficiary named in the policy had brought an action in a State Court to recover upon the policy, the company was not entitled to its attorneys fees out of the fund deposited, even if the Court had the discretion under some circumstances to allow a reasonable attorney's fee. The award of

\$250.00, attorneys fee for the insurer in the lower court represents a business expense incurred by the company for its own protection which was a direct result of the nonfeasance and negligence of the company. It is unthinkable that the beneficiary of the insured should be held responsible for the negligence of the company and the insurance fund be depleted to compensate the company for an ordinary business expense. Attorney's fees are not allowed where "decree in interpleader is sought by complainant for his own protection." Drummand Title Company v. Weimroth, 77 So. 2d 606, Braun v. Marsh, 123 So. 762.

V

Where an Insurance Company unreasonably refuses to pay a beneficiary of a life policy and unreasonably refuses to interplead adverse claimants until one claimant is forced to bring suit in court against Insurance Company, the claimant instituting suit is entitled to court costs and reasonable attorney's fee.

An insurance company has an obligation to settle all legal claims as expeditiously as possible. In the event of conflicting claims, the company has a duty to make every reasonable attempt to resolve the conflict and settle the claim. Money is a commodity in addition to being a media of exchange. The ability of money to earn interest is unchallenged and possession thereof is the requisite factor for such earnings. A company which is permitted to retain possession of money and earn interest thereon even though the principal sum belongs to an undetermined beneficiary receives an unwarranted benefit in the form of the interest earned after the right to the principal becomes vested in another. Such a benefit becomes more reprehensible when the beneficiary is undetermined due to the negligence of the company. This principle is true in the instant case where the monetary amount is small. It is equally true where the monetary amount is large and represents an important portion of the income of the company.

In the instant case, the insured died on June 3, 1956, and the appellant herein filed his claim with the insurer on June 14, 1956. On June 19, 1956, the company notified the appellee herein that she was the beneficiary of Policy N-1666239 but with regard to Policy N-1345696 "The company is unwilling to assume the responsibility of deciding to whom the proceeds of this policy should be paid." On August 17, 1956, the appellant herein notified the company that he would not release his claim to the policy. On August 22, 1956, the company stated that it would not pay the claim, that it act as stakeholder until an amicable agreement had been reached, and if not reached after a reasonable length of time would pay the proceeds into court. Three months passed and the company did nothing. On December 13, 1956 the appellant herein instituted suit in the Municipal Court of the District of Columbia against the insurer. On January 8, 1957 the insurer filed its bill of Interpleader in the U. S. District Court for the District of Columbia and deposited the fund with the registry of the Court. This was seven months after the initial claim had been made with the company and five months after appellant notified the company of his refusal to sign a release. The Company had use of the fund during this entire period and made no attempt to deposit it into court until forced to do so by appellant's suit.

The appellant herein believes that such laxity and laches on the part of the Company should not inure to the benefit of the company but that the appellant herein is entitled to the legal rate of interest beginning one month after the filing of his original claim. In John Hancock Mutual Insurance Company v. Daran, 138 F. Supp. 47, the Court held that where an insurance company delayed 10 months after filing of adverse claims to proceeds of life policy, and one month after one of claimants filed action against the company, to file bill of interpleader, on groundless contentions that it was prevented from filing sooner because of absence of guardian of property of infant claimant and because of adverse claims which were pressed, company was liable for interest

beginning one month after notice of adverse claims and was not entitled to recover its costs and attorneys fees from the fund. The appellant herein believes that to rule any other way would be an incentive to companies of this type to delay and prolong payment of legitimate claims for their own profit.

CONCLUSION

In the light of the foregoing, this Court should reverse the decision of the Court below in granting the Motion for Summary Judgment of Appellee Arline Mae Luckey, and awarding Appellee Aetna Life Insurance Company Attorney's fees and Court Costs from the fund deposited in the Registry of the Court; and this Court should further order the Court below to grant the Appellant's Motion for Summary Judgment, and order Appellee Aetna Life Insurance Company to pay to Appellant reasonable attorney's fees and interest beginning one month after it had notice of adverse claims.

Respectfully submitted,

LEO HOWARD KERNS

1632 K Street, N. W.
Washington, D. C.

Attorney for Appellant

(i)
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JOINT APPENDIX

[Filed January 8, 1957]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIAAETNA LIFE INSURANCE COMPANY)
1700 K Street, N. W.,)
Washington, D. C.,)

Plaintiff)

vs.)

Civil Action No. 58-57

ALBERT B. LUCKEY, JR.)
1244 - 28th Street, N. W.)
Washington, D. C.,)ARLINE MAE LUCKEY)
1470 Mercade)
Coral Gables, Florida,)

Defendants)

COMPLAINT FOR INTERPLEADER

1. The amount in controversy exceeds the sum of \$500.00 and jurisdiction of this Court is invoked under the provisions of the Federal Interpleader Act 28 USCA §§ 1335, 1397, 2361.

2. The plaintiff is a corporation doing business in the District of Columbia, with offices at 1700 K St., N. W.

3. The defendant Albert B. Luckey, Jr. is a citizen of the United States and a resident of the District of Columbia.

4. The defendant Arline Mae Luckey is a citizen of the United States and a resident of the State of Florida.

5. On or about April 19, 1942, the plaintiff issued to Albert B. Luckey its policy of life insurance #N 1 345 696 in the amount of \$2,500.00 payable on his death to the beneficiary or beneficiaries properly designated by the insured.

6. Albert B. Luckey died June 3, 1956 and each of the defendants claims the proceeds of said policy as beneficiary to the exclusion of the other.

7. Defendant Albert B. Luckey, Jr. has instituted action in the Municipal Court for the District of Columbia against the plaintiff, said proceeding being designated case number M36578-56.

8. The plaintiff has no interest in the amount due under the policy aforesaid and is but a stakeholder thereof, and desires to pay the said sum, that is to say, the sum of \$2,500.00, to the person or persons entitled thereto. Plaintiff believes that it is liable, under said policy, in the amount above indicated, but in the light of the premises set forth, plaintiff fears to pay said sum to either party defendant by reason of the possibility of its being subject to suit by each of them and to double liability.

9. Plaintiff has no interest in the matter other than to save itself harmless in the premises, and has not colluded with either party as against the other; and it is advised that it has a right to ask this Court to cause the parties defendant to interplead their respective claims so that the Court may decide and do justice in the premises and save the plaintiff harmless.

WHEREFORE, the premises considered, plaintiff demands:

1. That Albert B. Luckey, Jr. and Arline Mae Luckey be made parties defendant hereto and be required to answer the exigencies hereof.

2. That said defendants be compelled to interplead and state respectively their several claims so that the Court may adjudge to whom the remaining proceeds of said policy belong and decree payment thereof accordingly.

3. That upon the entry of a final decree in this cause, said defendants and each of them be forever enjoined from thereafter instituting or prosecuting any suit or suits against the plaintiff for the amount due under said policy of insurance upon the life of Albert B. Luckey, deceased, or for any part of said amount.

4. That plaintiff may be saved harmless in this controversy and that the Court decree the payment to the plaintiff of its reasonable counsel fees and costs in this behalf incurred, and that they be allowed to deposit the remainder of the proceeds into the registry of the Court.

5. And for such other and further relief as the nature of the case may require.

LASKEY and LASKEY

By: /s/ John L. Laskey
509 Albee Bldg.,
Washington, D. C.
Attorneys for Plaintiff

[Filed February 5, 1957]

**ANSWER OF DEFENDANT ARLINE MAE LUCKEY
TO COMPLAINT**

1. This defendant admits the allegations of the complaint and says that said policy as originally issued named as the beneficiaries thereof "Elsie Luckey, wife of the insured and Albert B. Luckey, Jr., son of the insured, equally, or to the survivor", that under date of April 29, 1942 the insured changed the beneficiaries of said policy to "Albert B. Luckey, Jr., son of the insured, if he survives the insured, otherwise Elsie Luckey, wife of the insured", that under date of November 24, 1954 the said insured changed the beneficiary of said policy to this defendant Arline Mae Luckey who remained such until the time of his death, and that as the designated beneficiary under said policy this defendant is entitled to the full amount payable thereunder by reason of the death of the said insured.

DRURY, LYNHAM & POWELL

By /s/ John M. Lynham
Attorneys for Defendant
Arline Mae Luckey
312 Colorado Building
Washington 5, D. C.

[Certificate of Service]

[Filed February 13, 1957]

**ANSWER OF DEFENDANT ALBERT B. LUCKEY, JR.
TO COMPLAINT FOR INTERPLEADER**

1. This defendant admits the allegations of paragraphs 1 through 7 of the Complaint for Interpleader.

2. This defendant alleges that the plaintiff, Aetna Life Insurance Company, wrongfully refused to pay the sum of \$2500.00 to this defendant and that plaintiff company has held these funds rightfully belonging to this defendant since June 3, 1956, and that this defendant is entitled to interest thereon at the rate of six (6%) per cent per annum from that date if adjudged by this Court to be entitled to receipt of said sum. This defendant further alleges that in order to obtain action of any kind on the part of plaintiff company he filed Civil Action No. M-36578-'56 in the Municipal Court for the District of Columbia, and that plaintiff company thereafter filed the Complaint for Interpleader herein.

3. This defendant alleges further that he is the beneficiary under the policy at issue, and that there has been no change of beneficiary subsequent to April 29, 1942, when this defendant was named beneficiary.

4. This defendant alleges that the plaintiff company is not entitled to deduct counsel fees and costs from the proceeds of the policy at issue before paying said proceeds into the Registry of this Court, and that this defendant is himself entitled to reasonable attorney's fees and costs from the plaintiff in accordance with Section 625.08 of the Florida Statutes Annotated.

5. This defendant stands ready to file the policy at issue with this Court for its consideration and judgment.

/s/ Leo Howard Kerns
Attorney for Defendant
Albert B. Luckey, Jr.
1632 K Street, N. W.
Washington 6, D. C.

[Certificate of Service]

[Filed May 2, 1958]

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant Albert B. Luckey, Jr., by and through his attorney, and moves this Honorable Court for a Summary Judgment in his favor in the sum of Two Thousand Five Hundred Dollars (\$2500.00), plus interest at the rate of six percentum (6%) per annum from June 3, 1956, to date, plus reasonable attorney's fees, and as reasons therefor states as follows:

1. The pertinent facts of this case are not in dispute, stipulations thereto are attached, and a trial of the facts is unnecessary.
2. All transactions surrounding the life insurance policy at issue herein took place in Florida, and the Florida law governing this case is clearly in favor of this defendant.
3. The defendant Albert B. Luckey, Jr., is entitled to the relief prayed for, as supported by the Points and Authorities attached.

/s/ Leo Howard Kerns
Attorney for Defendant
Albert B. Luckey, Jr.

* * *

[Certificate of Service]

[Filed May 2, 1958]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the defendants for the purposes of this proceeding only, that the following are the facts and are all of the facts relevant to the controversy herein between said defendants:

1. On January 20, 1942, Albert Benjamin Luckey made application to the plaintiff at Miami, Florida, for a policy of insurance on his own life, and on April 19, 1942, policy No. N-1 345 696 in the face

amount of \$2,500 was issued pursuant to said application and delivered to him in Florida. The original policy will be received in evidence without further proof.

2. The beneficiaries of said policy as originally issued were "Elsie Luckey, wife of the insured and Albert B. Luckey, Jr., son of the insured, equally, or to the survivor." On April 29, 1942, at Miami, Florida, the insured requested in writing that the beneficiary be changed to "Albert B. Luckey, Jr., son of the insured, if he survives the insured, otherwise Elsie Luckey, wife of the insured", and said request was accepted by the company on May 4, 1942, and attached to the policy.

3. The insured and the said Elsie Luckey were divorced on or about March 26, 1954, and the insured and Arline Mae Luckey, defendant herein, were married at Coral Gables, Florida, on or about April 22, 1954, and lived together as husband and wife until the death of the insured in Florida on June 3, 1956. The defendant Albert B. Luckey, Jr., was born on August 31, 1922, and is the only child of the insured. His mother is the said Elsie Luckey, former wife of the insured, and she is still living.

4. On November 24, 1954, the insured went to the office of the plaintiff in Miami, Florida, and signed and submitted a written request to change the beneficiary of said policy to "Arline Mae Luckey, wife of the insured." The original of said request or a photostatic copy thereof will be received in evidence without further proof. All premiums on the policy were paid by the insured.

5. On November 24, 1954, the Miami office of the plaintiff wrote to the Home Office of the company in Hartford, Connecticut, with respect to the request for change of beneficiary and enclosed an affidavit executed by the insured, and the Home Office replied under date of November 30, 1954. On or about December 9, 1954, the insured received a letter from the Miami office stating the position of the company with respect to the request, and the matter remained in that status until the death of the insured. Copies of the Miami office letter of November 24, 1954, of the affidavit, of the Home Office reply and of the letter to the

insured will be received in evidence without formal proof, subject to objections as to competency, materiality and relevancy.

Dated this _____ day of November, 1957.

/s/ Albert B. Luckey, Jr.
Defendant

/s/ Arline Mae Luckey
Defendant

[Filed May 2, 1958]

SUPPLEMENTARY STIPULATION OF FACTS

Supplementary to the stipulation of facts heretofore entered into by the defendants, it is hereby stipulated and agreed by and between the defendants for the purposes of this proceeding only that Elsie Luckey, if present, would testify as follows:

1. That for some time prior to her divorce from Albert B. Luckey, deceased, on March 26, 1954, and from that date until his death on June 3, 1956, she did not see the deceased, did not speak to him either in person or over the telephone, and that she received no communications, written or verbal, from him, and that she sent no such communications to him.

2. That at no time, either prior to or subsequent to her divorce from the said Albert B. Luckey, deceased, was a request or demand made by him upon her for any insurance policies or other property of any kind; and further that she did not even know of the existence of a policy of life insurance with the Aetna Life Insurance Company designated as Policy Number N 1345696 until subsequent to his death.

Dated this 14th day of April, 1958.

/s/ Albert B. Luckey, Jr.
Defendant

/s/ Arline Mae Luckey
Defendant

[Filed May 13, 1958]

**MOTION OF DEFENDANT ARLINE MAE LUCKEY
FOR SUMMARY JUDGMENT**

The defendant Arline Mae Luckey moves the court for summary judgment in her favor on the ground that there is no genuine issue of material fact to be decided and she is entitled to judgment herein as a matter of law.

DRURY, LYNHAM & POWELL

By /s/ John M. Lynham
 Attorneys for defendant
 Arline Mae Luckey

[Certificate of Service]

[Filed May 13, 1958]

EXHIBIT A

**AETNA LIFE INSURANCE COMPANY
AFFIDAVIT AND AGREEMENT**

Required Where A Policy Is Lost Or Destroyed And A
Copy Of Duplicate Requested

(To be executed by the insured and beneficiaries of legal age and also by
any other person of legal age who claims an interest)

- | | |
|--|---|
| <p>1. (a) Give number of the policy in the Aetna Life Insurance Company.
(b) State when it was last in your possession.</p> | <p>1. a. No. N1345696
b. Date 1949</p> |
| <p>2. In whose possession was the policy when it was lost or destroyed and where was it kept?</p> | <p>2. Name - In hands of former wife, now divorced. Want to change beneficiary to present wife.</p> |
| <p>3. (a) In what manner was it lost or destroyed?
(Give full details with dates.)
(b) Was it burned or stolen?</p> | <p>3. a.
b.</p> |
| <p>4. What efforts have been made to find the policy?</p> | <p>4.</p> |
| <p>5. (a) Has there been any assignment, transfer, or change in title of said policy?
(b) If so, give full particulars with names and dates.</p> | <p>5. a.
b.</p> |

Each of the undersigned hereby states that there is no reason to believe or suspect that said policy is in the possession or under the control of any person or party; that diligent search has been made for same, but that it cannot be found; and that this affidavit and agreement is made for the purpose of obtaining from said Insurance Company a copy or duplicate of said policy, and in consideration of the issuance thereof each undersigned agrees if said original policy shall be found, to immediately return it to said Company; and further agrees to indemnify and save harmless said Company from any claims or expense under or on account of the original copy of said policy.

State of Fla.)
County of Dade) ss.

/s/ Albert Benjamin Luckey

On this 24th day of November, 1954, personally appeared before me at Miami, State of Fla., the above named Albert Benjamin Luckey, and made oath that the statements and answers above made and subscribed are true and full.

[SEAL]

/s/ George Fisk [Notary Public]

[Filed May 13, 1958]

EXHIBIT B

CHANGE OF BENEFICIARY

Execute in duplicate, forwarding original and duplicate
to Company with policy.

AETNA LIFE INSURANCE COMPANY
Hartford, Connecticut

IS HEREBY REQUESTED TO CHANGE THE DEATH BENEFICIARY OF
POLICY NO. N1345696 ISSUED BY SAID COMPANY ON THE LIFE OF
Albert Benjamin Luckey, TO Arline Mae Luckey, wife of the insured.

Unless otherwise requested herein, (a) if more than one beneficiary is
named, payment shall be made in equal shares to those of said bene-
ficiaries who survive the insured; (b) if no beneficiary named survives
the insured, payment shall be made to the executors or administrators
of the insured.

Signed in duplicate at Miami, Florida, this 24th day of
November, 1954

/s/ Mary Ellison
Witness

/s/ Albert Benjamin Luckey
Signature of Policyholder - Full name

The foregoing request for change of benefit is hereby accepted.

Hartford, Connecticut, this ____ day of
____ 19 ____

AETNA LIFE INSURANCE COMPANY

/s/ James B. Simmons
Secretary

Registrar.

[Filed May 13, 1958]

EXHIBIT C

INTER-OFFICE COMMUNICATION

To POLICY TITLE DIVISION Date November 24, 1954
 From W. B. Arnold, Jr., G/A Subject Policy No. N1345696
 Miami, Florida Albert Benjamin
 INCLOSED FIND: Name - Luckey

- () Original and duplicate request for change of beneficiary.
 The policy is held at this Agency. When the Company has accepted this request for change of beneficiary and returned the original thereof, it will be attached to the policy at this Agency and the former beneficiary provision cancelled.
- () Policy.
- (X) Request for change of Beneficiary
- () Request for change of name of insured.
- () Proof of death of beneficiary.
- () Assignment in favor of
- () Relinquishment of assignment by
- () Appropriation in favor of
- ()

PREMIUM STATUS:

- (X) Premium paid to January 19, 1955.
- () Premiums fully paid, or paid up policy.
- () Policy in force under extended insurance feature.

REMARKS: We are enclosing Form 1399 on the above policy for what it may be worth. The insureds former wife refuses to sign, and will not release the policy

()

[Filed May 13, 1958]

EXHIBIT D

W. B. Arnold, Jr., G.A.
Miami, Fla.

Nov. 30, 1954

N-1, 345, 696 - Albert B.
Luckey

HO POL Title

In view of the situation described in your letter of November 24 all we can do is to hold the beneficiary forms on file until such time as the insured can recover his policy so that the change of beneficiary can be completed.

R. B. Buckley, Jr.

KR

Asst. Superintendent

P.S. In all probability no settlement of this policy can be made without a release from the former wife and the present wife and son.

[Filed May 13, 1958]

EXHIBIT E

AETNA LIFE INSURANCE COMPANY
HARTFORD, CONNECTICUT

W. B. Arnold, Jr. G/A
990 S. W. 1st Street
Miami 36, Florida

December 8, 1954

Mr. Albert B. Luckey
P. O. Box 22
Islamorada, Florida

Re: N1666239
N1345696

Dear Mr. Luckey:

We are enclosing Policy No. N1666239 on which the beneficiary has been changed.

Regarding the other policy No. N1345696 our reply from the Home Office reads as follows:

"In view of the situation described in your letter of November 24 all we can do is to hold the beneficiary forms on file until such time as the insured can recover his policy so that the change of beneficiary can be completed."

If we can be of further service please let us know.

Very truly yours,

W. B. ARNOLD, JR. G/A

By: /s/ L. Abercrombie

la

[Filed July 7, 1958]

FINAL JUDGMENT

Upon consideration of the cross motions for summary judgment filed herein by the defendant Albert B. Luckey, Jr. and the defendant Arline Mae Luckey, it is by the Court this 7th day of July, 1958, adjudged and ordered as follows:

1. That the motion of the defendant Albert B. Luckey, Jr. be, and the same hereby is denied.
2. That the motion of the defendant Arline Mae Luckey be, and the same hereby is granted.
3. That the plaintiff be, and it hereby is allowed an attorneys' fee of Two Hundred Dollars (\$200) plus taxable costs amounting to \$36.
4. That the Clerk of Court shall draw checks on the funds deposited in the Registry and deliver the same to the payees, as follows:
\$236.00 to John L. Laskey, as attorney for Aetna Life Insurance Company
\$2,264.00 to Drury, Lynham and Powell, as attorneys for Arline Mae Luckey

5. That this judgment shall be entered without costs.

BY THE COURT:

/s/ Edward M. Curran
Judge

Seen:

LASKEY & LASKEY

By /s/ John L. Laskey
Attorneys for Plaintiff

/s/ L. H. Kerns
Attorney for Defendant, Albert B. Luckey, Jr.

DRURY, LYNHAM & POWELL

By /s/ John M. Lynham
Attorneys for Defendant Arline Mae Luckey

[Filed July 14, 1958]

NOTICE OF APPEAL

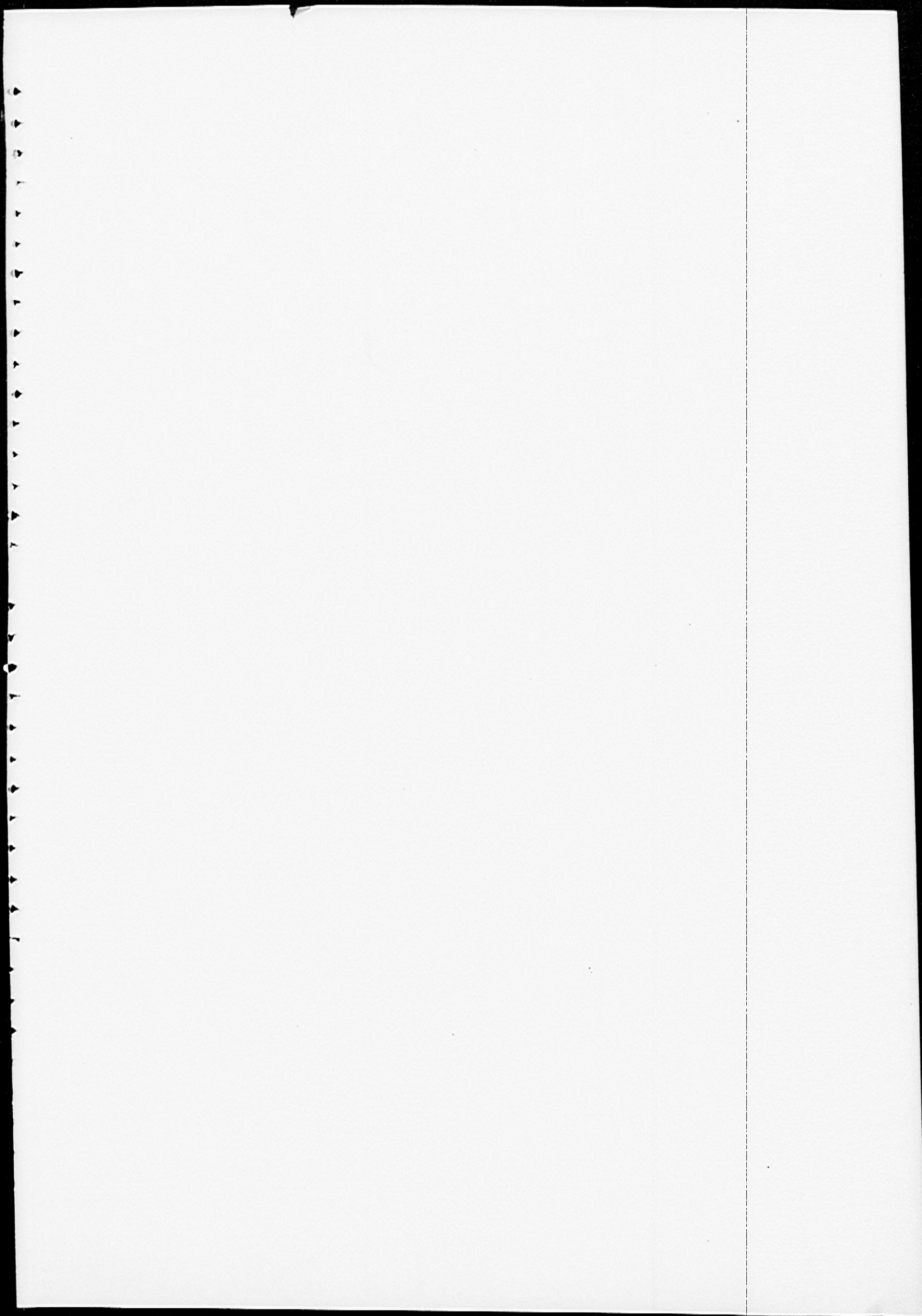
Notice is hereby given this 14th day of July 1958, that defendant Albert B. Luckey, Jr. hereby appeals to the United States Court of Appeals for the District of Columbia from the Order of this Court entered on the 7th day of July, 1958 in favor of defendant Arline Mae Luckey against said Albert B. Luckey, Jr.

/s/ Leo Howard Kerns
Attorney for defendant
Albert B. Luckey, Jr.

Copies To:

John L. Laskey, Atty. for Plaintiff
509 Albee Bldg., Washington, D. C.

John M. Lynham, Atty. for Defendant Arline M. Luckey
Colorado Building, Washington, D. C.



FILED MAR - 9 1959

BRIEF FOR APPELLEE
AETNA LIFE INSURANCE COMPANY

Joseph W. Stewart
CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,688

ALBERT B. LUCKEY, JR.,

Appellant,

v.

ARLINE MAE LUCKEY, ET AL.,

Appellees.

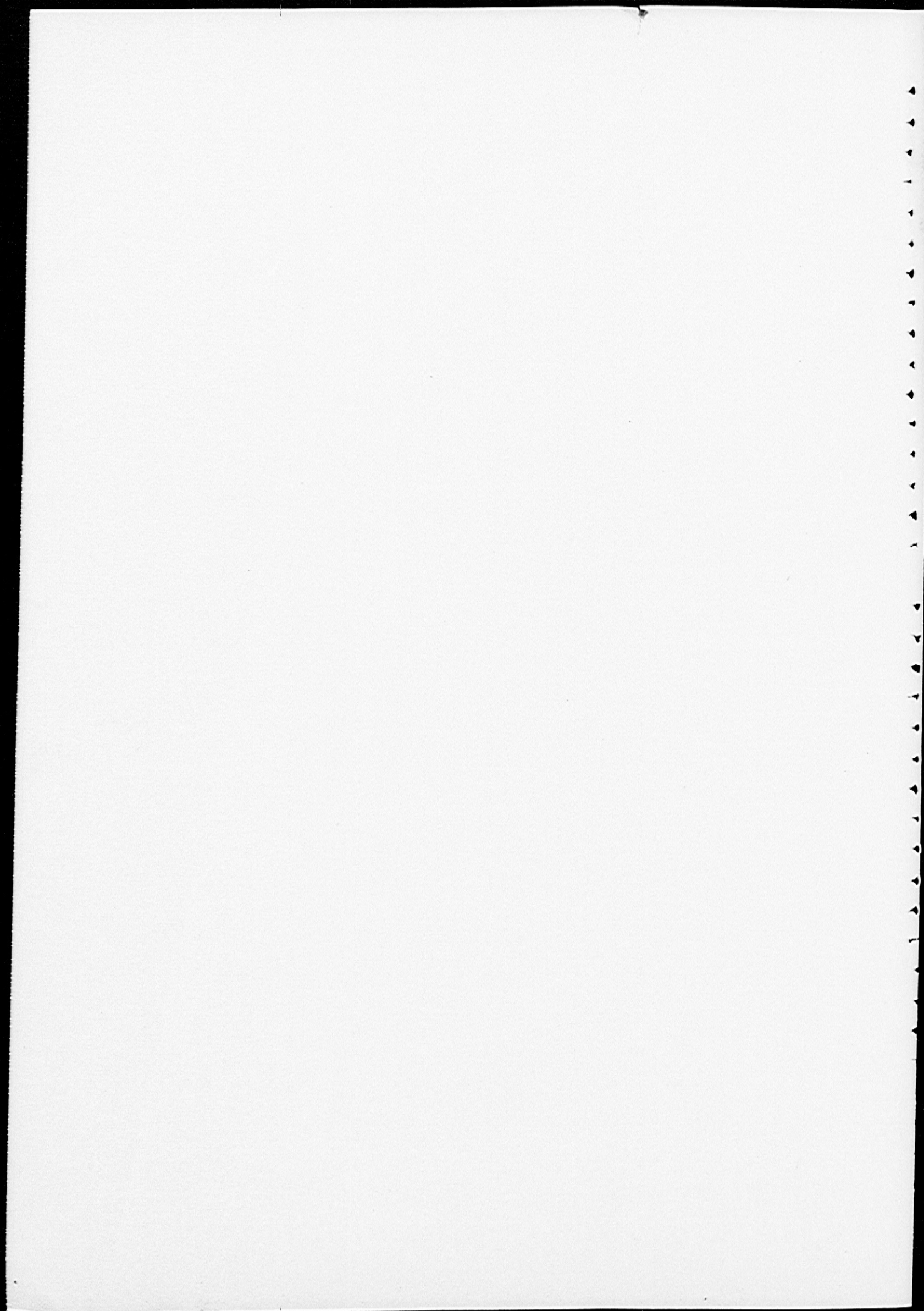
APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN L. LASKEY

DYER JUSTICE TAYLOR

Laskey and Laskey
509 Albee Building
Washington, D. C.

Attorneys for Appellee
Aetna Life Insurance Company



(i)

STATEMENT OF QUESTIONS PRESENTED

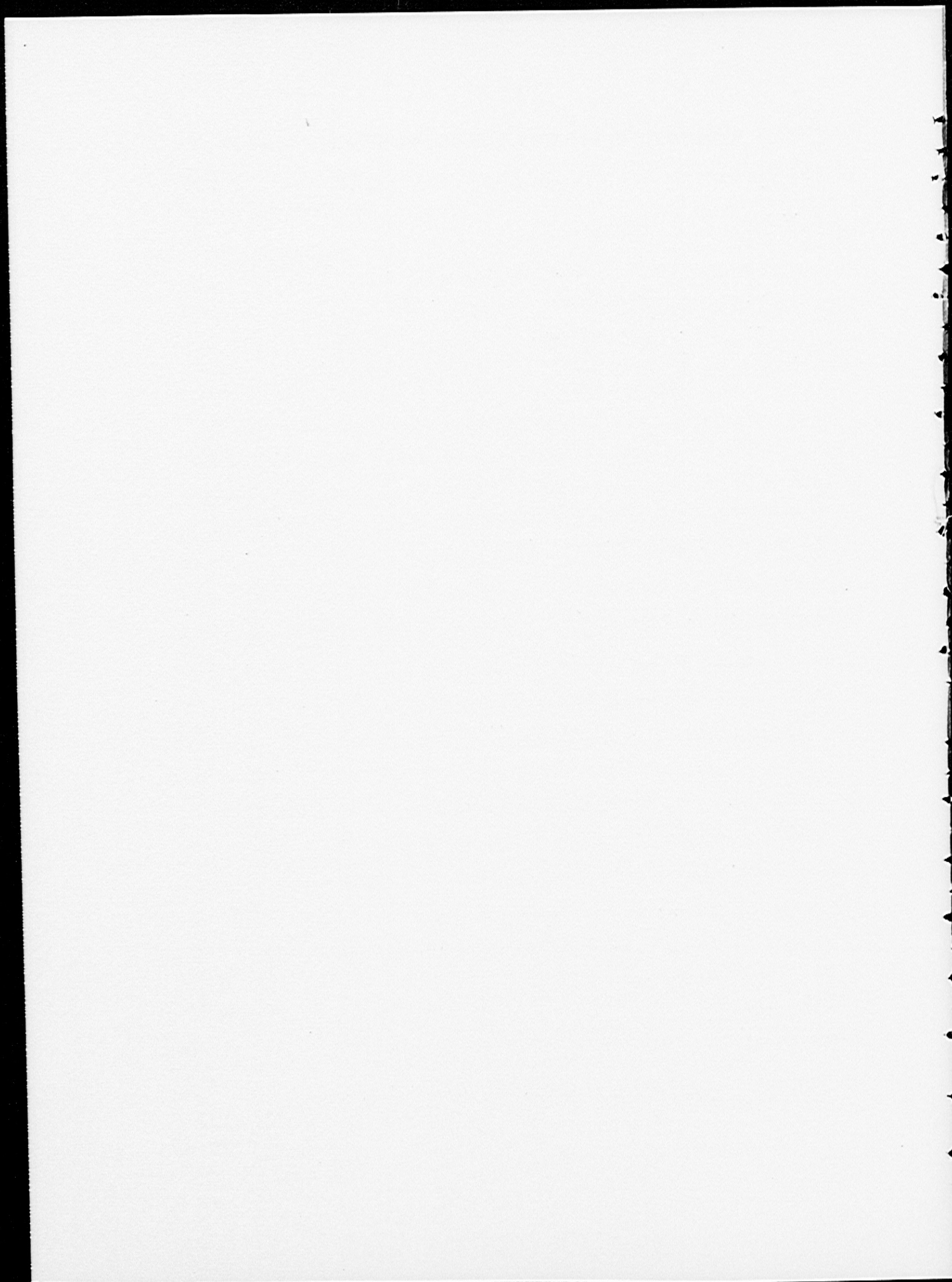
In the opinion of the appellee Aetna Life Insurance Company, the questions presented are:

1. If the judgment appealed from is affirmed, will this Court then decide an abstract question concerning the effect of the Federal Interpleader Act on the lower court's discretionary authority to award attorney fees and costs.

2. If the judgment appealed from is reversed, does the District Court have the power, under a Florida statute, to award attorney's fees against the insurer herein where the Florida statute provides that an insurer shall pay a beneficiary reasonable attorney's fees upon "the rendition of a judgment . . . by any of the courts of this state against any insurer in favor of the beneficiary." (Emphasis supplied)

3. If the judgment appealed from is reversed, should this Court consider appellant's contentions that appellee Aetna Life Insurance Company waited an unreasonable time before paying the proceeds from the policy into the registry of the court and that as a result of such unreasonable action should suffer certain penalties (Statement of Points — Nos. 3, 4 and 5), where

- (a) the award of interest and attorney fees is within the discretion of the trial court; and
- (b) the appellant has not designated or filed a record sufficient to enable this Court to pass on the three points, even if it undertook to do so.



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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 14,688

ALBERT B. LUCKEY, JR.,

Appellant,

v.

ARLINE MAE LUCKEY, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE
AETNA LIFE INSURANCE COMPANY

COUNTERSTATEMENT OF THE CASE

The appellee Aetna Life Insurance Company, in order to have resolved the conflicting claims to the proceeds of a policy of life insurance, was compelled to file a complaint for interpleader herein on January 8, 1957, naming as defendants the appellant Albert B. Luckey, Jr. and appellee Arline Mae Luckey. Jurisdiction was based upon the Federal Interpleader Act, Act of June 25, 1948, c. 646, 62 Stat. 931, 936 and 970,

as amended by Act of May 24, 1949, c. 139, 63 Stat. 105, U.S.C.A., Title 28, Secs. 1335, 1397 and 2361. (J.A. 1) The amount of the policy in question, \$2,500.00, was subsequently paid into the registry of the court. In its complaint, appellee company demanded the payment of its reasonable counsel fees and costs. (J.A. 3) Answers were filed. (J.A. 3-4) The appellant filed a motion for summary judgment on May 2, 1958, accompanied by a stipulation and supplemental stipulation of facts. (J.A. 5-7) The appellant, in his motion for summary judgment, requested that he be awarded "interest at the rate of six percentum (6%) per annum from June 3, 1956, to date, plus reasonable attorney's fees" (J.A. 5) Appellant did not file any document showing when he had filed a claim for the fund with the appellee Company and did not file any of the correspondence referred to in the last paragraph of his "Statement of the Case", to wit, correspondence dated June 14, 1956, June 19, 1956, August 17, 1956 and August 22, 1956. (Appellant's Brief, pp. 3-4). Nor did he file any papers whatsoever pertaining to the negotiations of the parties between the date of death of the insured (June 3, 1956) and up to and including the date he filed his Municipal Court action. (J.A. 4)¹

The appellee Arline Mae Luckey, the second wife of the assured and the prevailing party below (J.A. 6, 13), filed her motion for summary judgment on May 13, 1958. She did not file copies of any letters or documents relating to the negotiations of the parties subsequent to the death of the insured.

The appellee Company did not file a motion for summary judgment.²

¹ Although it does not appear of record, the appellant states that he filed the Municipal Court action on December 13, 1958. (Appellant's Brief, p. 4)

² Although not printed as part of the joint appendix, the record will show that appellee Company filed a memorandum in opposition to appellee's motion for summary judgment, insofar as it requested interest and attorney fees from the Company. The memorandum also showed that the Company was entitled to its attorney's fees and costs.

On July 7, 1958, the Court entered judgment for the appellee Arline Mae Luckey for the amount of the policy (\$2,500.00), less \$236.00 to be paid to the attorney for appellee Company for attorney fees and costs.

Consistent with the position taken by the appellee Arline Mae Luckey in the lower Court, she does not here contest the award of the attorney fees and costs to the appellee Company.

STATUTES INVOLVED

In addition to the provisions of the statute of the State of Florida appearing in the Appellant's Brief at page 4, the following statutes are involved in this appeal:

U.S.C.A., Title 28, Sec. 1335 provides that:

"Sec. 1335. Interpleader

"(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of \$500 or more, or having issued a note, bond, certificate, policy of insurance * * * if

"(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount due under such obligation into the registry of the court, there to abide the judgment of the court * * *. June 25, 1948, c. 646, 62 Stat. 931."

U.S.C.A., Title 28, Sec. 1397 provides that:

"Sec. 1397. Interpleader

"Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside. June 25, 1948, c. 646, 62 Stat. 936."

U.S.C.A., Title 28, Sec. 2361 provides that:

"Sec. 2361. Process and procedure

"In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. * * *

"Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate order to enforce its judgment. June 25, 1948, c. 646, 62 Stat. 970, amended May 24, 1949, c. 139, sec. 117, 63 Stat. 105."

RULE INVOLVED

Rule 54(d) of the Federal Rules of Civil Procedure provides as follows:

"(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs;"

SUMMARY OF ARGUMENT

I

If the judgment for appellee Arline Mae Luckey is affirmed, the award of attorney fees and costs to appellee Aetna Life Insurance Company will remain unchallenged by either appellant or appellee Arline Mae Luckey. A decision on the question of whether the Federal Interpleader Act permits the granting of such fees and costs would call for an expression of opinion on an abstract matter, which this Court will not render.

II

A statute which requires an insurance company to pay an attorney fee to a prevailing beneficiary is highly penal and is to be strictly construed. A state statute, therefore, which provides for the payment of attorney fees to a beneficiary upon the rendition of a judgment by the courts "of this state" can have no application to a judgment rendered by a District of Columbia Court. (Florida Statutes Annotated, Section 625.08 - Appellant's Brief, p. 4)

III

The award of interest and attorney fees is a matter within the discretion of the trial court and will not, in the first instance, be undertaken by this Court. In any event, the appellant has not designated or filed a record sufficient for the determination of such issues.

ARGUMENT

I

The court below had jurisdiction over the parties and the subject matter of the complaint. Accordingly, it had the discretionary authority to award attorney fees and costs out of the proceeds from the insurance policy which were paid into court. The appellee Arline Mae Luckey has not contested the award of such fees and costs. If, therefore, the judgment for appellee Arline Mae Luckey is affirmed, there remains for decision only the abstract question whether the Federal Interpleader Act, Act of June 25, 1948, c. 646, 62 Stat. 931, 936 and 970, as amended by Act of May 24, 1949, c. 139, 63 Stat. 105, U.S.C.A., Title 28, Secs. 1335, 1397 and 2361, and Rule 54(d) of the Federal Rules of Civil Procedure, permit the granting of such attorney fees and costs. An abstract question will not be decided by this Court. Spreckels Sugar Co. v. Wickard, 75 U.S. App. D.C. 44, 131 F. 2d 12 (1941).³

If this Court affirms the judgment of the court below in favor of the appellee Arline Mae Luckey, there will be no need to consider the further arguments set forth hereinbelow.

³ In the event that the judgment for appellee Arline Mae Luckey is reversed, this Court may desire to indicate to the lower court that the federal courts clearly have discretionary authority under the Federal Interpleader Act, supra, to award attorney fees and costs to a disinterested stakeholder. Mutual Life Ins. Co. v. Bondurant, 27 F. 2d 46 (6 Cir. 1928), cert. denied, 278 U.S. 630 (1928); Massachusetts Mutual Life Ins. Co. v. Morris, 61 F. 2d 104 (9 Cir. 1932); Globe Indemnity Co. v. Puget Sound Co., 154 F. 2d 249 (2 Cir. 1946); Bank of China v. Wells Fargo Bank & Union Trust Co., 209 F. 2d 467 (9 Cir. 1953); United States v. Ullman, 115 F. Supp. 211 (D.C. Penn. 1953); and cases cited at 48 ALR 2d 190, 192-193.

Florida rule is to the same effect. McKennon v. Reliance Co., 113 Fla. 320, 151 So. 699 (1933); Miller v. Gulf Life Ins. Co., 148 Fla. 1, 3 So. 2d 519 (1941).

The only District of Columbia case is contrary to the recognized federal rule. Continental Trust Co. v. Corbin, 80 F. Supp. 394 (1924). This case, however, was prior to the present Federal Interpleader Act. See Mutual Life Ins. Co. v. Bondurant, supra.

Even if this Court desired to consider the statements in appellant's brief in regard to events subsequent to the death of the insured, and then rule on Points 3, 4 and 5 of appellant's brief (interest and attorney fees), it would be prohibited from doing so because the statements referred to are not part of the record below or on appeal. See T.V.T. Corporation v. Basiliko, ___ U.S. App. D.C. ___, 257 F. 2d 185 (1958).

II

The statute of the State of Florida set forth at page 4 of appellant's brief (Section 625.08) is apparently relied upon by appellant as the basis for his request for attorney fees and costs if he prevails on this appeal. Appellant is incorrect in stating that state law controls when a federal court exercises its discretion to award attorney fees and costs under the Federal Interpleader Act. Bank of China v. Wells Fargo Bank & Union Trust Co., 209 F. 2d 467, 476 (9 Cir. 1953); and Palomas Land Cattle Co. v. Baldwin, 189 F. 2d 936 (9 Cir. 1951).

Even if state law did apply, the Florida statute would provide no basis for the court to award appellant attorney fees and costs against appellee Aetna Life Insurance Company. The statute states, in pertinent part, that "Upon the rendition of a judgment or decree by any of the courts of this state against any insurer in favor of the beneficiary under any policy or contract of insurance executed by such insurer, there shall be" (Appellant's Brief, p. 4) (Emphasis supplied)

Such a statute is highly penal and must be strictly construed. Equitable Life Assurance Society v. Hughes, 152 F. Supp. 187 (D. C. Ark. 1957). Obviously, therefore, since the judgment appealed from was not entered by a Florida Court the quoted statute can have no application herein. Even if the statute were held to apply it would not permit of automatic application but the case would have to be remanded to the lower court for the exercise of its discretion. Equitable Life Assurance Society v. Hughes, supra; and Argument III, infra.

III

The award of interest and attorney fees is a matter within the discretion of the trial court and will not, in the first instance, be undertaken by this Court. As stated in Cave v. District of Columbia, 67 App. D.C. 138, 90 F. 2d 383 (1937), this Court will "review only the case made in and tried in the lower court." (67 App. D.C. at 141) If, therefore, the judgment for the appellee Arline Mae Luckey is reversed, this case must then be remanded to the trial court so that it may receive evidence and, in the exercise of its discretion, decide the issues raised by the appellant in points 3, 4 and 5 of his Statement of Points herein (Appellant's Brief, p. 5).⁴ The evidence which the trial court would receive would be the correspondence referred to in the last paragraph of appellant's Statement of the Case (Appellant's Brief, pp. 3, 4), relating to part of the negotiations among the parties subsequent to the death of the insured, which was not before the trial court and, of course, not properly before this Court. Other correspondence would be introduced into evidence by the appellee Company. The total of such evidence, and accompanying argument, would show that the delay was not unreasonable; that the appellee Company is a disinterested stakeholder and does not have a substantial interest in the result of the litigation; that the appellee Company could not ascertain to whom the insurance fund was payable because both the adverse claims have substance; and that the appellant had waived its right to demand that the complaint for interpleader be filed immediately after the insured's death. For illustrative cases see: Aetna Life Ins. Co. v. DuRoure, 123 F. Supp. 736 (D.C. N.Y. 1954); Aetna Life Ins. Co. v. Wade, 97 So. 836 (Ala. 1923); Equitable Life Assurance Society v. Kit, 22 F. Supp. 1022 (D.C. Penn. 1938); United Co-Operative Farmers v. Oksila, 156 F. Supp. 118 (D.C. Mass. 1957); Brown v. Marsh, 123 So. 762, 765 (Fla. 1929).

⁴ The issues would be whether the appellee Aetna Life Insurance Company waited an unreasonable time before paying the proceeds from the policy into the registry of the Court and, if so, (a) whether it should be required to pay interest on the money - and in what amount; (b) whether it should recover from the fund its attorney's fees and costs; and (c) whether appellant should recover its attorney fees and costs from the Company.

CONCLUSION

If the judgment appealed from is affirmed, the award of attorney fees and costs to appellee Aetna Life Insurance Company should not be disturbed.

If the judgment appealed from is reversed, the case should be remanded to the lower court in order that it may receive evidence and, in the exercise of its discretion, decide the issues raised by appellant in points 3, 4 and 5 of his Statement of Points herein.

Respectfully submitted,

JOHN L. LASKEY

DYER JUSTICE TAYLOR

Laskey and Laskey
509 Albee Building
Washington, D. C.

Attorneys for Appellee
Aetna Life Insurance Company

No. 14,688

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALBERT B. LUCKEY, JR.,

Appellant,

vs.

ARLINE MAE LUCKEY, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

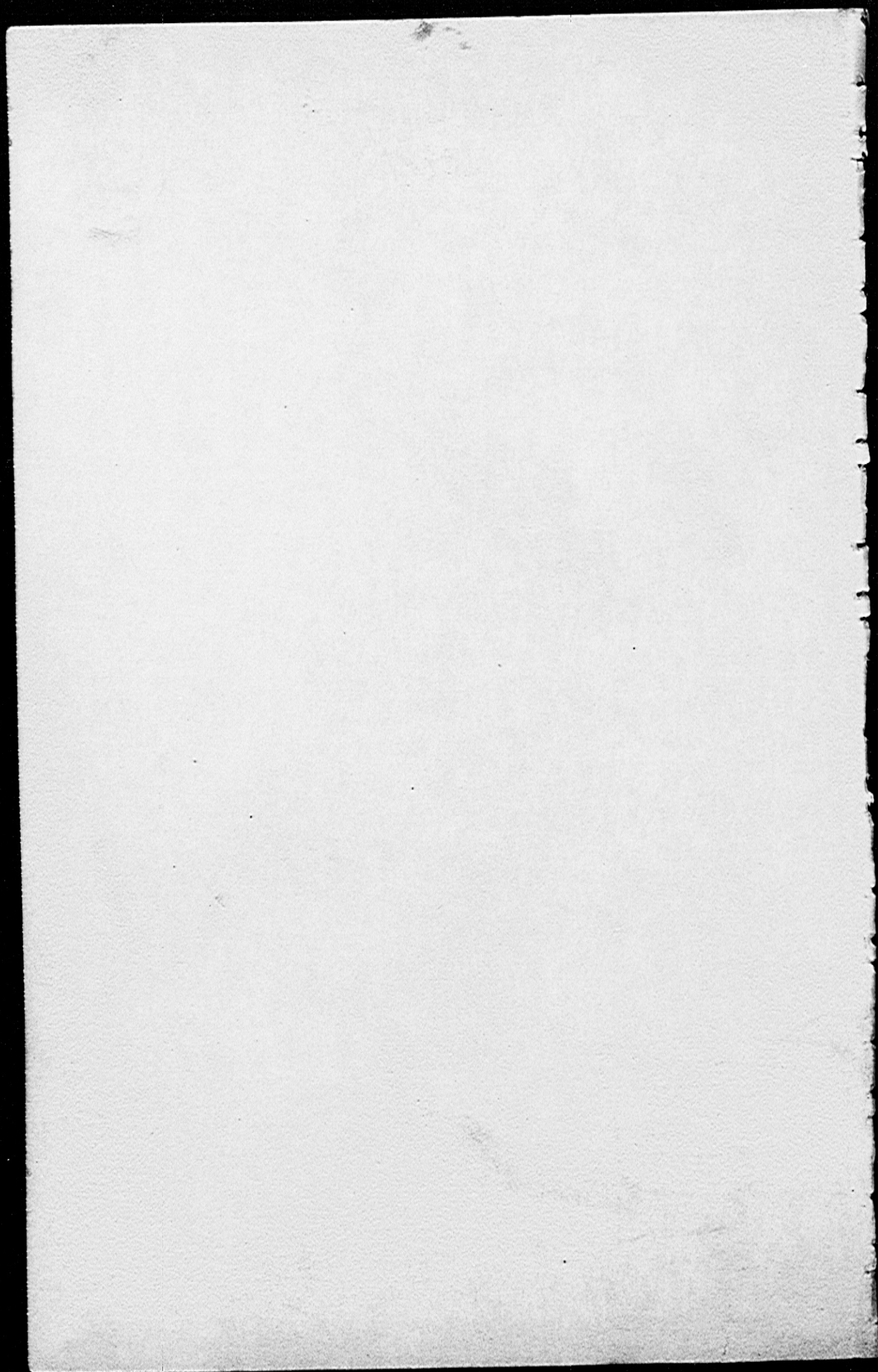
BRIEF FOR APPELLEE ARLINE MAE LUCKEY

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED FEB 27 1959

Joseph W. Stewart
CLERK

**ARTHUR P. DRUBY,
JOHN M. LYNHAM,
JOHN E. POWELL,
HENRY H. PAIGE,**
*Attorneys for Appellee
Arline Mae Luckey.*



Statement of Question Presented

In appellee's opinion the question presented is: In a contest between the insured's son by a former marriage (appellant) and the insured's widow (appellee), did the lower Court err in granting appellee's motion for summary judgment when all of the facts were stipulated and the sole issue was whether the efforts made by the insured during his lifetime to obtain a duplicate of his lost policy and to change the beneficiary thereof were effective?

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,688

ALBERT B. LUCKEY, JR.,

Appellant,

vs.

ARLINE MAE LUCKEY, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE ARLINE MAE LUCKEY

Counterstatement of the Case

All of the facts were stipulated (J.A. 5-7). However, it is important to note that when the insured went to the Miami office of the insurance company on November 24, 1954, to change the beneficiary of his policy, the affidavit which he executed averred that the policy was lost and that

the purpose of the affidavit was to obtain a duplicate (J.A. 9).

Summary of Argument

This is not the case of an insured trying to change the beneficiary of a policy known to be in existence, nor does it involve the right of an insurance company to insist upon strict compliance with policy provisions relating to a change of beneficiary. The record shows that the insured believed his policy was lost and that he did everything the company asked him to do in order to obtain a duplicate and to change the beneficiary to appellee. Therefore, the District Court was right in holding that the change was effective and in awarding the proceeds to appellee.

Argument

In appraising the record in this case it is important to keep in mind (a) that this is not a case involving the right of an insured to change the beneficiary of a policy known to be in existence, and (b) that there is no issue here as to the right of the insurance company to require strict compliance with the provisions of the policy.

The record shows that the insured applied at the Miami office of the company for a duplicate of his lost policy and for a change of beneficiary to appellee. The affidavit executed by the insured on that occasion (J.A. 9) is the only evidence of the purpose of his visit. It is headed "AFFIDAVIT AND AGREEMENT Required Where a Policy is Lost or Destroyed and a Copy or Duplicate Requested". In it the insured answered certain questions concerning the original policy, as follows:

- | | |
|---|--|
| 1. (a) | 1. a. |
| (b) State when it was
last in your pos-
session | b. Date 1949 |
| 2. In whose possession
was the policy when it
was lost or destroyed
and where was it kept? | 2. Name In hands of former
Where wife Now divorced
kept Want to change
beneficiary to pres-
ent wife |

In addition, the insured stated in his affidavit that "there is no reason to believe or suspect that said policy is in the possession or under the control of any person or party; that diligent search has been made for same, but that it cannot be found; and that this affidavit and agreement is made for the purpose of obtaining from said Insurance Company a copy or duplicate of said policy, ..."

It is true that the form letter transmitting the affidavit from Miami to the home office of the company (J.A. 11) stated that the former wife of the insured "refuses to sign, and will not release the policy", but the record discloses no justification for this statement, and it is in direct conflict with the specific averments made by the insured in his affidavit. In any event, this letter would not be binding on the insured because there is no suggestion that it ever came to his attention, and it is not surprising that the insured took no further action to change the beneficiary of his policy after receiving the letter of December 8, 1954, from the Miami office (J.A. 12).

That the insured honestly believed the policy was lost is further supported by the supplementary stipulation (J.A. 7), in which the former wife of the insured says that she did not even know of the existence of the policy until after the death of the insured. This, of course, explains why the

insured made no inquiry of her as to the whereabouts of the policy, and it is apparent that had such an inquiry been made it would have been fruitless.

It is appellee's position that the insured, believing that the policy was lost, did everything he could reasonably be required to do to obtain a duplicate policy and to change the beneficiary to appellee. Conversely, it is appellee's position that the fact that the original policy happened to come to light in the hands of the insured's former wife after the death of the insured should not be permitted to frustrate his expressed desire to change the beneficiary, particularly when the insured paid all the premiums on the policy and his former wife never even knew of its existence until after the insured's death.

The cases cited by appellant do not involve lost policies; therefore they are inapplicable to the facts of this case, whether it is to be decided under the laws of Florida or elsewhere. The general principle which does apply is stated in the annotation appearing in 19 *A.L.R.* 2d at page 16:

(7) A completely different situation is presented in the case where the insured has done everything required by the terms of the policy to effectuate a change of beneficiary except to deliver the policy to the insurer for indorsement. The general rule in this case is that where the failure of the insured to deliver the policy to the insurer for indorsement is due to the fact that the policy is lost, destroyed, or otherwise inaccessible to the insured, the attempted change will be held effective, while where the failure to deliver the policy is due to the insured's negligence or remains unexplained, the attempted change will, as a general rule, be held not to have been effected.

The most frequent ground upon which the failure of

the insured to deliver the policy to the insurer for indorsement is based is the refusal of the beneficiary to surrender the policy to the insured. It is uniformly held that such explanation for the insured's failure to surrender the policy to the insurer constitutes a sufficient excuse, and in those cases in which there exists a fair inference that the policy would not have been surrendered by the beneficiary if demand had been made, it is not necessary that it be affirmatively proved that the insured made a demand upon the beneficiary to surrender the policy to him.

And at page 75 (Section 31) it is said:

Where the insured does everything in his power to effect a change of beneficiary, the mere fact that he is unable to surrender the policy for indorsement of the change by the insurer because the policy has been lost will not render the change invalid.

The cases cited in support of this statement are:

Jackson v. Leonard (1929) 169 Ga. 324, 150 S.E. 152
Twyman v. Twyman (1923) 201 Ky. 102, 255 S.W. 1031
Dunnavant v. Mountain States L. Ins. Co. (Mo. App. 1(1939), 67 S.W. 2d 785
Re Lynch's Estate (1929) 135 Misc. 436, 237 N.Y.S. 663

In *Jackson v. Leonard*, *supra*, it appeared that the daughter applied to the company to change the beneficiary of her policy from her mother to her husband, stating that the policy was lost. The company issued a duplicate policy, and upon the death of the insured both the mother, who produced the original policy, and the husband claimed the proceeds. The company interpleaded, and the court entered judgment in favor of the husband as beneficiary. On appeal

by the mother it was held that by the issuance of a new policy the company waived all restrictions and conditions, and that the husband was entitled to recover under the duplicate policy.

In *Dunnavant v. Mountain States Life Ins. Co., supra*, it appeared that the wife of the insured was named beneficiary, had retained possession of the policies since issue, and had paid all of the premiums. Differences developed between the insured and his wife, and while a patient in a hospital the insured made a formal request to change the beneficiary to his estate and executed an affidavit to the effect that the policies were lost, that after a diligent search he had been unable to locate them, and that the affidavit was executed for the purpose of having a duplicate policy issued. After the death of the insured the widow brought suit on the policies, which she still had in her possession, and the court held that she had no standing to sue because the insured had effected a change of beneficiary, saying that the company had a right to waive the requirement of indorsement on the policies and surrender of the policies for that purpose.

Commonwealth Life Ins. Co. v. Lowry (U.S.D.C., S.D. Fla. 1941), 41 F. Supp. 1, was an interpleader action by the insurer against the insured's former wife and sister. It appeared that following the divorce the insured went to the company's agent and submitted a lost policy affidavit and a request to change the beneficiary to his sister. The agent sent these to the home office, but the home office requested him to obtain a lost policy affidavit from the insured's former wife also, and no further action was taken up to the insured's death. One of the contentions of the former wife was that the efforts of the insured to change the beneficiary were ineffective. However, the Court found that the original policy was held by the former wife without the knowl-

edge of the insured, that any request for the policy would have been useless, and that therefore it was impossible for the insured to send the policy to the company for indorsement. It was held that the insured had done everything in his power to have the policy indorsed and concluded that his efforts to change the beneficiary were effective. This case appears to have been decided primarily under the laws of Tennessee, but is interesting here because the facts are almost identical with the facts in the case at bar.

While the insurance company may be entitled to strict compliance with the provisions of the policy relating to a change of beneficiary insofar as its own interests might be affected, nevertheless it is now recognized that such a provision is for the benefit of the insurer only, and that the bringing of an action by the insurer under the Federal Interpleader Act (28 U.S.C.A. 1335) operates as a waiver of these policy provisions insofar as the adverse claims are concerned [*American National Insurance Company v. Reid* (U.S.D.C., W.D. Okla. 1952), 108 F. Supp. 428].

Conclusion

It is respectfully submitted that whether this case is to be decided under the laws of the State of Florida or elsewhere, the action of the Court below in giving effect to the change of beneficiary is supported by the record, and should be affirmed.

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JOHN E. POWELL,
HENRY H. PAIGE,
Attorneys for Appellee
Arline Mae Luckey,
312 Colorado Building,
Washington 5, D. C.
(4298-6)

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,688

*United States Court of Appeals
For the
District of Columbia Circuit*
FILED MAR 13 1959

ALBERT B. LUCKEY, JR.,

Appellant,

Joseph W. Stewart
CLERK

v.

ARLINE MAE LUCKEY, ET AL.,

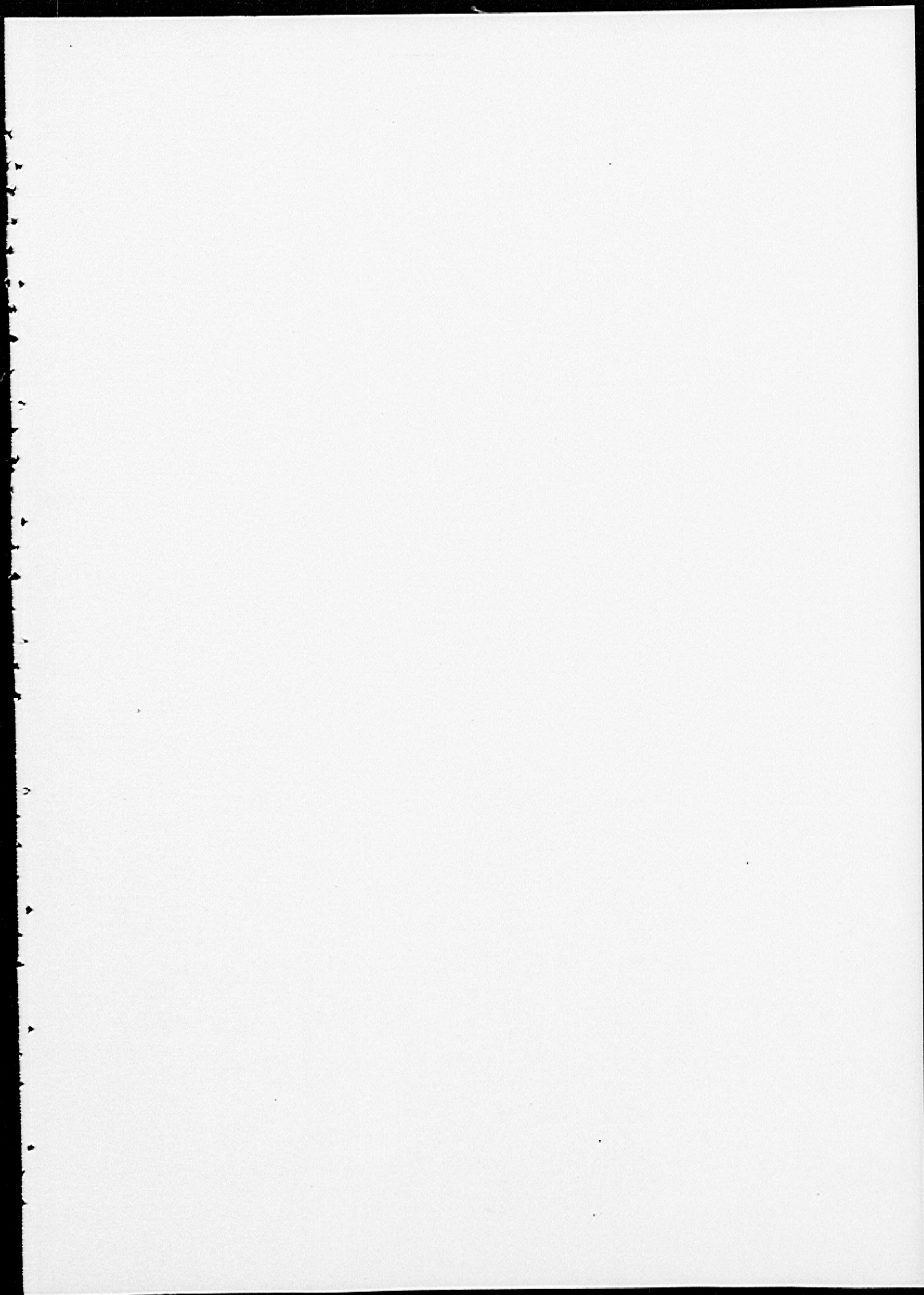
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEO HOWARD KERNS

1632 K Street, N. W.
Washington, D. C.

Attorney for Appellant.



UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 14,688

ALBERT B. LUCKEY, JR.,

Appellant,

v.

ARLINE MAE LUCKEY, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF

INTRODUCTORY STATEMENT

The brief filed by the Appellant herein correctly states the facts and the applicable law. The purpose of filing this reply brief is only to crystalize certain points made by the Appellee in their brief.

The Appellee's only defense is that the Policy was lost and insured did everything the company asked him to do in order to obtain a duplicate and to change the beneficiary to the Appellee (Appellee's Br. p. 2)

The Appellee also quotes from the printed language of the affidavit and Agreement (Appellee's Br. p. 3).

I

A careful examination of the affidavit (J.A. 9) reveals the following. The title thereof is "Affidavit and Agreement" (underlining added). The latter terminology indicates that the "Agreement" is an attempt to change the provisions of the original contract of insurance. As such, it can only be read in context with "Change of Beneficiary" form (J.A. 10) in which it is stated

"The foregoing request for change of benefit is hereby accepted.

Hartford, Connecticut, this ____ day of
_____, 19 ____

Aetna Life Insurance Company

/s/ James B. Simmons
Secretary

Registrar

Since the company never accepted the agreement, it must follow that the company did not waive the conditions contained in the policy and the terms of the original contract of insurance remained in force. Such a condition is one solely for the protection of the company (Appellant's Br. p. 13).

In addition, the printed portion of the affidavit stated the following (J.A. 10): "That diligent search has been made for same but that it cannot be found," (underlining added). It is obvious that no diligent search occurred from the stipulated set of facts (J.A. 7). The former wife of the insured had possession of the policy and the insured so stated in his affidavit that the policy was in her possession since 1949.

And yet, by stipulation, the former wife states "that at no time, either prior to or subsequent to her divorce from the said Albert B. Luckey (insured herein), deceased, was a request or demand made by him upon her for any insurance policies or other property of any kind," (underlining added). The time element here is inclusive of the insured's entire life and no demand was made for the policy even though the insured knew where it was located. Yet, the Appellee would have the court believe that the insured paid premiums on a "lost" policy for seven years (Appellant's Br. pp. 10 and 11).

II

In regard to the cases cited by Appellee, it is notable that no Florida cases have been cited even though Florida law governs the proceeding. It is equally notable that the citation from 19 ALR 2d (Appellee's Br., pp. 4 and 5) states "while where the failure to deliver the policy is due to the insured's negligence or remains unexplained the attempted change will, as a general rule, be held not to have been effected" (underlining added). In the instant case, there is no explanation as to why the insured did not attempt to recover the policy. It was in the possession of the insured's former wife. Yet there is nothing in the record to show why the insured did not request the former wife to give him the policy. Since both insured and former wife resided in the same area, a simple telephone request would have delivered the policy. Quoting further from 19 ALR 2d, Appellee's brief states ". . . and in those cases in which there exists a fair inference that the policy would not have been surrendered by the beneficiary if demand had been made, it is not necessary that it be affirmatively proved that the insured made a demand upon the beneficiary to surrender the policy to him." In the instant case, the person who had possession of the policy was not the beneficiary and there is not a scintilla of evidence to show, or even hint, that a request for the policy would not have been promptly honored.

Quite obviously, the policy was of no value to the holder as she was not the beneficiary and could not profit from such possession.

The Jackson Case cited by the Appellee (Appellee's Br., p. 5) is wholly inapplicable here inasmuch as the company did not issue a new policy and the policy in the instant case was not lost.

The Dunnavant Case cited by Appellee (Appellee's Br., p. 6) is also inapplicable here because the company did not waive the requirement of endorsement on the policy.

The Commonwealth Case (Appellee's Br., p. 6), although decided in the Florida District Court, was decided by the applicable laws of the State of Tennessee, not Florida. It differs from the instant case also as the court found that the original policy was held by the former wife without the knowledge of the insured, and that any request for the policy would have been useless (underlining added). In the instant case, the insured knew where the policy was located and made no request for it or attempt to regain possession.

In the instant case, the company did not bring its interpleader action until the Appellant herein instituted suit against the company in the Municipal Court of the District of Columbia. The company could hardly waive the conditions of the contract at this time inasmuch as the other contracting party was deceased and the rights of the beneficiary to the fund became vested at the time of the insured's death.

CONCLUSION

The Appellant has endeavored here to answer only those matters raised by the Appellee which appeared to call for a reply. As to those arguments advanced by the Appellee not here treated, the court is referred to the appropriate portion of Appellant's main brief.

It is respectfully submitted that the position of the Appellant, set forth in his main brief, is well founded in law and in fact and the final judgment of the U. S. District Court for the District of Columbia should be reversed.

Respectfully submitted,

LEO HOWARD KERNS

1632 K Street, N. W.
Washington, D. C.

Attorney for Appellant

BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 14,689

FILED

NOV 24 1958

Joseph W. Stewart

CAFETERIA AND RESTAURANT WORKERS UNION
LOCAL 473, AFL-CIO, ET AL.,

v. **641** Appellants,

NEIL H. McELROY, INDIVIDUALLY AND AS
SECRETARY OF DEFENSE, ET AL.,

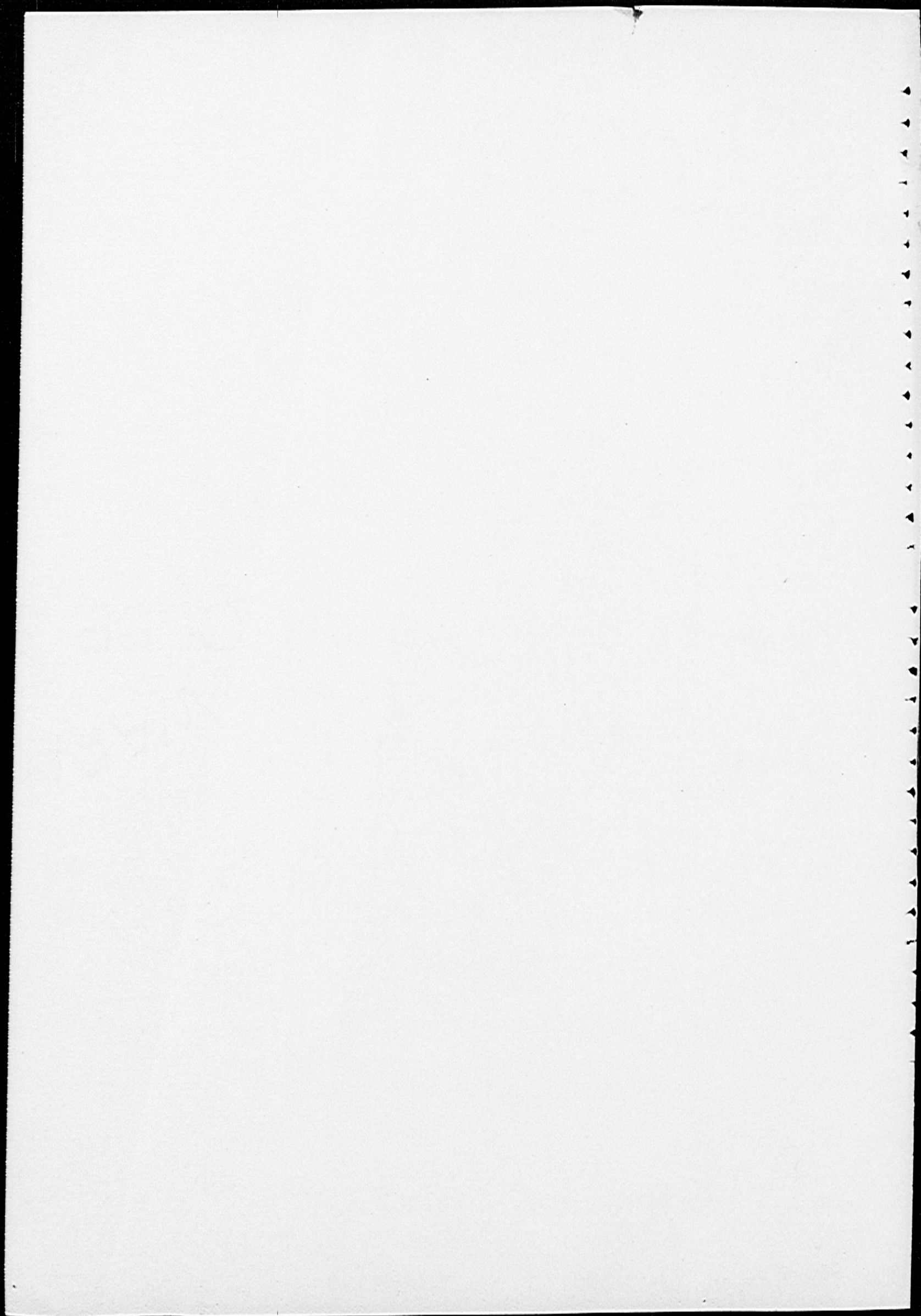
Appellees.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERNARD DUNAU

912 Dupont Circle Building, N. W.
Washington 6, D. C.

Attorney for Appellants.



(i)

STATEMENT OF QUESTIONS PRESENTED

1. A civilian nongovernmental employee works as a short order cook at a cafeteria located within the premises of the Naval Gun Factory. The employee works for a civilian nongovernmental employer who operates the cafeteria under a contract with the Naval Gun Factory. The superintendent of the Naval Gun Factory and his security officer cause the employer to discharge the employee because she allegedly fails to meet the "security requirements." There was no disclosure of what the security requirements constitute, no statement of reasons particularizing the respects in which the employee allegedly failed to meet them, and no hearing of any kind at which to know or meet the evidence supporting the bare conclusion. The first question presented is whether the officers acted without authority, and if their action was authorized, whether it was constitutional.

2. Whether the action of the employer, in discharging the employee for no reason other than the unauthorized or unconstitutional demand of the officers, violated its collective bargaining agreement with the union by which it promised "not to suspend or discharge any employee without good and sufficient cause."



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UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 14, 689

CAFETERIA AND RESTAURANT WORKERS UNION,
LOCAL 473, AFL-CIO, ET AL.,

Appellants,

v.

NEIL H. McELROY, INDIVIDUALLY AND AS
SECRETARY OF DEFENSE, ET AL.,

Appellees.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This case is before the Court on appeal from an order of the District Court, docketed on July 30, 1958, denying appellants' motion for summary judgment (J. A. 103), granting governmental appellees' cross-motion for summary judgment (J. A. 103, 104), and dismissing the complaint as to all appellees (J. A. 132). Notice of appeal was filed on August 14, 1958 (J. A. 133). The jurisdiction of the court below

was invoked under 28 U.S.C. §§1331, 1337, Section 301(a), Title III, Labor Management Relations Act, 1947 (61 Stat. 156, 29 U.S.C. §185), and D. C. Code, §11-306 (1951) (J.A. 3). The jurisdiction of this Court rests on 28 U.S.C. §1291.

STATEMENT OF THE CASE

The court below found, and we agree, "that there is no genuine issue as to any material fact. . ." (J.A. 132). The following statement is based upon the admitted allegations of the complaint, the admittedly authentic exhibits annexed to the complaint, the answers to interrogatories promulgated by plaintiffs, and uncontroverted affidavits. Among the exhibits annexed to the complaint is the transcript of a hearing held before a Board of Arbitration, pursuant to a collective bargaining agreement between Appellant Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO, and Appellee M & M Restaurants, Inc., at which sworn and uncontroverted testimony pertinent to the dispute was adduced (J.A. 38, 34-70).

A. The Parties To The Appeal

The parties to this appeal may be identified as follows:

1. Plaintiff-Appellant Cafeteria and Restaurant Workers Union, Local 473, affiliated with Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, transacts business and has its office within the District of Columbia (J.A. 3, 50-52). It is herein called the Union.¹ The Union represents for purposes of collective bargaining and other mutual aid and protection about 2,600 employees who work in cafeterias and restaurants within the District of Columbia and the adjacent area (*ibid.*).

¹ In January 1956, at the time of its affiliation with the International Union, and as a result of such affiliation, the numerical designation of the Union was changed from "471" to "473". The Union remained one and the same organization despite the change in its numerical designation. (J.A. 3, 50-51).

2. Plaintiff-Appellant Rachel M. Brawner, a resident of the District of Columbia, is a member of the Union (J.A. 4, 90).

3. Defendant-Appellee Neil H. McElroy is Secretary of Defense. Defendant-Appellee Thomas S. Gates is Secretary of the Navy. Defendant-Appellee D. M. Tyree, who holds the rank of Admiral in the Navy, was at the times material herein superintendent of the United States Naval Gun Factory, an installation within the Department of the Navy located in the District of Columbia. Defendant-Appellee H. C. Williams, who holds the rank of Lieutenant Commander in the Navy, is security officer of the United States Naval Gun Factory (J.A. 4, 90, 93, 107.)

4. Defendant-Appellee M & M Restaurants, Inc., herein called the Company, transacts business within the District of Columbia, and at the times material herein had an office at the United States Naval Gun Factory. It operated three main cafeterias for the United States Naval Gun Factory within the District of Columbia. It also operates numerous other cafeterias and restaurants in the several states. (J.A. 5, 90, 93, 107, 124.)

B. The Status Of The Union; Its Collective Bargaining Agreements With The Company; The Status Of The Company And The Employees Working For It At The Naval Gun Factory; And The Agreement Between The Company And The Naval Gun Factory.

1. The status of the Union and its collective bargaining agreements with the Company.

Up to September 1946, the cafeterias at the United States Naval Gun Factory were operated by a Miss H. K. Dickson. In 1942, during the period of Miss Dickson's operation, the Union was certified by the National Labor Relations Board as the exclusive bargaining representative of the employees working at the cafeterias, following an election conducted by the Board on July 15, 1942. (J.A. 4-5, 49-50, 90, 93.)

In September 1946, the Company took over the operation of the cafeterias from Miss Dickson (J. A. 5, 90, 93). From that time, and throughout the period of its operation of the cafeterias, the Company recognized the Union as the exclusive bargaining representative of its employees at the cafeterias (J. A. 5, 90). Section 1 of the collective bargaining agreement between the Company and the Union, entered into on March 15, 1954 and in effect at the times material to this controversy, provides that (J. A. 5, 18-19, 90):

The Employer agrees to recognize the Union as the exclusive bargaining agency for all employees (excluding cashiers, checkers, and supervisors) of the Navy Yard Cafeterias, and of all cafeterias or food serving establishments which the Employer may take over and operate within the Navy Yard.

Section 6 of this collective bargaining agreement provides in part that (J. A. 5, 19, 90):

The Employer agrees not to suspend or discharge any employee without good and sufficient cause.

This provision has been in each of the collective bargaining agreements between the Company and the Union since the inception of their relationship in September 1946 (J. A. 5, 50, 90).

2. The status of the Company and the employees working for it at the Naval Gun Factory and the Concessionaire Agreement between the Company and the Naval Gun Factory.

The employees at the cafeterias operated by the Company for the Naval Gun Factory are civilian nongovernmental personnel. The Company is a civilian nongovernmental employer. The cafeterias are operated pursuant to an agreement, entered into on October 1, 1955 between the Company and the Board of Governors of the Naval Gun Factory Cafeterias. This agreement is styled "Agreement For Food Services Concessionaire." The personnel of the Board of Governors, composed of seven civilian governmental employees employed by the Naval Gun Factory, are appointed by the Superintendent of the Naval Gun Factory.

(J. A. 5-6, 90, 94.) Section 5(b) of the Concessionaire Agreement provides that (ibid.):

The Concessionaire shall engage all the personnel necessary to maintain efficient service at a high standard of cleanliness and sanitation, and shall be responsible for all compensation due to such personnel pursuant to the operation under this Agreement. In no event shall the Concessionaire engage, or continue to engage, for operations under this Agreement, personnel who

(i) fail to pass satisfactory medical examinations where the handling of food is involved;

(ii) are not courteous, conscientious and competent to perform the duties to which they are assigned;

(iii) fail to meet the security requirements or other requirements under applicable regulations of the Activity as determined by the Security Officer of the Activity.

C. The Company's Separation Of Appellant Rachel M. Brawner From Employment At The Bellevue Annex Cafeteria At The Request of The Security Officer Of The Naval Gun Factory.

One of the cafeterias operated by the Company for the United States Naval Gun Factory is known as the Bellevue Annex Cafeteria, located at Overlook Drive and Chesapeake Street, S. W., Washington, D. C. Appellant Rachel M. Brawner worked at that cafeteria as a short order or breakfast cook. Up to her separation on November 15, 1956, Mrs. Brawner had been employed by the Company for six and one-half years. Working Monday through Friday, 6:00 a. m. to 3:00 p. m., at the hourly rate of \$1.18, Mrs. Brawner operated the steam table at the cafeteria, prepared and served breakfast and lunch, cleared tables, washed dishes, and cleaned up. The employment record of Mrs. Brawner was completely satisfactory and she was above average in the discharge of her duties. (J. A. 6, 27, 39-41, 62, 90, 94.)²

² Mrs. Brawner, 38 years old, is married, lives with her husband, and has nine children. A resident of Washington, D. C., since she was three, she attended the District schools to the eleventh grade. A member of the John Stewart Memorial Church, a Methodist church, she attends services regularly. Mrs. Brawner reads Good Housekeeping, Readers Digest, Better Homes and Gardens, and Watchtower, and she belongs to the Condensed Book Club, the books of which are put out by the Readers Digest. Her daily newspaper fare consists of the Washington Star and the Washington News. She favors the Democratic Party. (J. A. 38-39, 44-45.)

On November 14, 1956, H. R. Pyles, Secretary-Treasurer of the Board of Governors, telephoned Harold R. Baker, supervisor of the Company's cafeterias at the Naval Gun Factory, to request that the Company have Appellant Rachel Brawner turn in her identification badge (J. A. 7, 90, 94). Pyles informed Baker that defendant H. C. Williams, security officer of the Naval Gun Factory, had advised that a question of security clearance for Brawner existed and that he, the security officer, would no longer permit her to have the badge (J. A. 7, 36-37, 56, 90).³ Pyles further told Baker that, should the request to lift Brawner's identification badge be questioned in view of the provision of the collective bargaining agreement safeguarding employees from discharge except for "good and sufficient cause," section 5(b) of the Concessionaire Agreement should be cited as authority for the action requested (J. A. 7, 68-69, 90).⁴ An identification badge is required to secure entrance to and exit from the grounds (J. A. 7, 90, 94).

On November 15, 1956, the Company relieved Appellant Brawner from work at the cafeteria, and instructed her to proceed to the office of Harold R. Baker. There, Baker stated to Brawner that he had been requested to pick up her identification badge, and, when asked why, he stated "for security reasons." Shocked and surprised, Brawner denied

³ While the governmental officers in their answer to the complaint deny the allegation contained in this sentence (J. A. 94), in their answers to interrogatories they state that "Mr. Baker inquired as to the reason [for having Rachel Brawner surrender her identification badge to Lieutenant Commander Williams] and was informed that it was for security reasons and that the badge was to be returned as soon as possible" (J. A. 98). The import of the allegation of the complaint and the answer to the interrogatory is therefore identical. The Company admitted the allegation of the complaint (J. A. 90), and the allegation corresponds to the sworn and uncontroverted testimony at the arbitration hearing (J. A. 36-37, 56).

⁴ While the governmental officers in their answer to the complaint deny the allegation contained in this sentence (J. A. 94), their answer to the interrogatories simply fails to advert to this element of the conversation (J. A. 98-99). This element of the conversation is admitted by the Company in its answer (J. A. 90), and it corresponds to the sworn and uncontroverted testimony of its agent at the arbitration hearing (J. A. 68-69, 62-63), the agent having participated in the conversation. Furthermore, in his letter to counsel for the Union, appellee Tyree, Superintendent of the Naval Gun Factory, specifically adverted to Section 5(b)(iii) of the Concessionaire Agreement as authority for the action taken (J. A. 32-33). There is therefore no reason to doubt this element of the conversation. It is in any event not material to the disposition of the questions of law.

that she had ever done anything to bring her security status into question, and she asked what recourse she had. Baker stated he could not tell her anything except that he had been directed to pick up her badge. He suggested that she might see the security officer, or the superintendent, or Oliver T. Palmer, the business agent of the Union. Brawner turned in her badge. (J. A. 12, 41-42, 61, 90.) As Appellant Brawner testified at the arbitration hearing (J. A. 41-42):

Well, when I first went in, I sat down and Mr. Baker told me that he was sorry, that he had been told to pick up my badge, and I asked Mr. Baker what for, and he said: "For security reasons."

I said "What about security? I haven't did anything. I don't know anything that I did."

And he said: "That's all I know, to pick up your badge."

I said: "What must I do or who do I see?"

He said: "Write a letter to the Superintendent of the Yard," and he said "I would" -- well, he said if he were me, he would write a letter to the superintendent.

* * *

I turned my badge over to Mr. Baker, and he asked the clerk to write me a slip of paper to get out of the gate, so that I could show it to the Marine on the gate.

Baker testified at the arbitration hearing that he observed that "naturally it upset her a great deal"; he noted that "I could not tell her anything except I had been directed to take such an action"; and he "tried to explain to her the several steps which I thought might be possible for her to follow, including going to the Security Officer himself, and to the Superintendent, and of course I also told her to see Mr. Palmer, her business agent" (J. A. 61).

On November 15, 1956, Baker turned over Brawner's identification badge to the security officer, appellee H. C. Williams. At that time, admittedly, the security officer gave no reason for his action, except to say that he would not permit her to continue to retain the badge because her security status was in question. Admittedly, neither before, then, nor thereafter did the security officer, the superintendent, the

Board of Governors, or any other official give any explanation for this conclusion to either Brawner, the Union, or the Company. (J.A. 8, 90, 94.)

From November 15, 1956, Appellant Brawner no longer worked for the Company. From that day forward she has received no wages or other benefits from the Company. (J.A. 13, 90.) On November 16, 1956, the Company received a confirmatory memorandum from the Board of Governors (J.A. 8, 58, 91, 95):

1. The Board was notified on the afternoon of November 14, 1956 by LCDR H. D. Williams, Security Officer, Naval Gun Factory, that Rachel Brawner, head steam table employee, presently working at the Bellevue Cafeteria, would have to surrender her Naval Gun Factory badge and would not be permitted to enter the Naval Gun Factory until clearance is certified by the Security Officer.

2. This office immediately contacted Mr. Baker and requested to return the badge. Rachel Brawner's badge was returned to the Security Officer on 15 November 1956.

At the time of her initial employment at the Naval Gun Factory, Appellant Brawner had been, as are all employees, screened to determine her eligibility to receive an identification badge, and no question of her eligibility to have it had been raised for six and one-half years (J.A. 8, 63-67, 99-100, 101-103). In the course of her employment at the cafeteria, Brawner had no access to classified information; and, indeed, Harold R. Baker, supervisor of the Company's cafeterias at the Naval Gun Factory, has no access to classified information (J.A. 8, 68, 94, 99).⁵

⁵ The answer of the governmental officers admits that Brawner and Baker "have no authorized access to classified information" (J.A. 94). In reply to an interrogatory designed to determine whether this admission was intended to imply that Brawner and Baker may have other than authorized access to classified information (J.A. 97), the governmental officers stated: "Neither Brawner nor Baker have authorized access to classified information, however the defendants are unable to state whether or not Brawner or Baker have had access to any of the restricted areas on the premises of the Naval Gun Factory or whether Brawner or Baker have access to any classified information" (J.A. 99). In his testimony at the arbitration hearing, in answer to a question whether Mrs. Brawner has access to classified information, Baker replied, "I hardly think so"; and in answer to the (footnote continued on page 9)

D. The Attempt To Guess At The Reason
For The Conclusion That Appellant
Rachel M. Brawner Failed "To Meet
The Security Requirements. . . ."

On November 15, 1956, immediately following her separation from employment, Appellant Brawner went directly to see Oliver T. Palmer, business agent of the Union, and reported to him what had transpired (J. A. 8, 42, 91). In her earlier conversation with Mr. Baker, Mrs. Brawner had understood him to say that the question relating to her security clearance pertained to "something which happened in 1946" (J. A. 42). Accordingly, Mr. Palmer asked her to search her mind as to anything which might have happened in 1946 which might bear on her security (J. A. 42). At that time Mrs. Brawner had been employed at Lansburgh's (J. A. 42). She recalled seeing the Daily Worker in another employee's possession at Lansburgh's (J. A. 42). Mrs. Brawner then thought it was a "regular newspaper," "something like a Union would put out"; she later learned as a result of newspaper stories concerning the Rosenberg espionage case that it was a Communist paper (J. A. 43). As to the employee in whose possession the paper was, Mrs. Brawner did not then, and does not now, know whether she is a Communist; this employee never asked Mrs. Brawner to engage in Communist activity or to join the Party (J. A. 43). This employee never discussed Communism,

(footnote continued from preceding page.)

question whether he has access to classified information, Baker replied, "No, sir" (J. A. 68). As she testified at the arbitration hearing, Mrs. Brawner's work at the cafeteria as a short order cook kept her fully occupied (J. A. 39-41), and she did not even know what went on in the two offices of the very building in which the cafeteria was housed (J. A. 39). Moreover, the governmental officers merely say they "are unable to state" whether Brawner or Baker have other than authorized access to classified information or restricted areas; what they are unable to state they cannot assert. Finally, if the governmental officers do intend to imply that access to classified information consists in being at a location where such information exists, the implication is flatly in conflict with the United States Navy Security Manual for Classified Matter on which they themselves rely. Section 0206 of the Manual defines "classified matter" as "official information or material in any form or of any nature the safeguarding of which is necessary in the interest of national defense and which is classified for such purpose by responsible classifying authority." Section 0201 defines access to be the "ability and opportunity to obtain knowledge of classified matter. An individual does not have access to classified matter merely by being in a place where such matter is kept, provided the security measures which are in effect prevent him from gaining knowledge of such classified matter." (Emphasis added.)

and all that Mrs. Brawner knows of her in this connection is that she "saw her one day with a Daily Worker in her hand" (J. A. 43).

Actually, it appears that Mrs. Brawner misunderstood Mr. Baker's reference to 1946. As Baker testified at the arbitration hearing, he told Mrs. Brawner that a security investigation "could go back to 1945 or 1946, wherever you had your first job" (J. A. 64). He did not intend to suggest that anything did then transpire, for, as he testified, "I have no knowledge of anything relating to her within that time" (J. A. 65).

E. Efforts To Secure Appellant Rachel M.
Brawner's Restoration To Employment
At The Bellevue Annex Cafeteria.

At a meeting of representatives of the Company and the Union on November 20, 1956, and in ensuing correspondence between the Company and the Union, the Union protested that the Company's separation of Appellant Brawner was "without good and sufficient cause" and hence in violation of Section 6 of the aforesaid collective bargaining agreement (J. A. 8-9, 20-21, 22-23, 45-48, 91). The Union repeatedly sought from the Company a statement of the reasons underlying the conclusion that Mrs. Brawner did not meet security requirements (*ibid.*). The Company repeatedly replied that it did not know, and was unable to obtain from either the Security Officer or the Superintendent of the Naval Gun Factory, an elucidation of the underlying reasons (J. A. 8-9, 21-22, 23, 26-28, 46-47, 91). The Company took the position that its action was based on Section 5(b) (iii) of the Concessionaire Agreement (*ibid.*).

In connection with the Union's attempt to secure a statement of reasons underlying the conclusion that Appellant Brawner's security status was in question, the Union also requested that a meeting be arranged with officials of the United States Naval Gun Factory at which to discuss the matter, and that a fair hearing be accorded Appellant Brawner (J. A. 9, 46-47, 91). On December 12, 1956, the Company wrote the Board of Governors, United States Naval Gun Factory Cafeterias, to request "that a meeting be arranged during the week January 7-11, 1957,

for the purpose of a hearing relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner" (J. A. 9, 25, 91, 95). On January 10, 1957, the Company wrote the Union to state that (J. A. 9, 26-27, 91):

We have been informed by the Superintendent, U. S. Naval Gun Factory via the Board of Governors, U. S. Naval Gun Factory Cafeterias, that such a meeting would serve no useful purpose and is therefore unnecessary.

This response was based on a memorandum to the Company from the Board of Governors, which enclosed a memorandum from the Superintendent to the Board of Governors (J. A. 10, 59-60, 91, 100). The latter memorandum reads (ibid.):

1. By reference (a), the Chairman of the Board of Governors, Naval Gun Factory Cafeterias, requested that a meeting be arranged, participants consisting of the Naval Gun Factory Security Officer, members of the Board of Governors, representatives of M & M Restaurants, Inc. and agents of the Restaurant Employees Union to discuss the action relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner, a cafeteria employee.

2. Paragraph 5(b) iii of reference (b) [Agreement for Food Services Concessionaire between Board of Governors, U. S. Naval Gun Factory and M & M Restaurants, Inc. of 1 October 1955 (NavExos 3732 (4-55))] stipulates that the contractors will employ only those who meet the security requirements for admission to the Naval Gun Factory. It is considered that the subject cafeteria employee does not meet these security requirements and therefore entrance privileges to the Naval Gun Factory have been revoked.

3. It is considered that the above decision is proper in this case and that the meeting proposed in reference (a) would serve no useful purpose and is therefore unnecessary.

On January 11, 1957, in accordance with Section 24 of the collective bargaining agreement, the Union wrote the Company requesting arbitration of the discharge of Appellant Brawner and naming Samuel H. Jaffee as its designee on the Board of Arbitration. On January 16, 1957, the Company wrote the Union acknowledging the request for arbitration and naming Vinton E. Lee as its designee on the Board of Arbitration.

Thereafter, the Company substituted John B. Cullen for Vinton E. Lee. On February 1, 1957, Samuel H. Jaffee filed a Demand for Arbitration with the American Arbitration Association. It reads in part as follows:

Claim:

On November 15, 1956, the Company improperly and contrary to contract, discharged Rachel Brawner without good and sufficient cause.

Relief:

The relief requested is that the Company be required to reinstate Rachel Brawner; that Rachel Brawner be made whole for any loss of pay she sustained as a result of her discharge; and that such other and further relief be granted as is appropriate.

Thereafter, pursuant to the procedures of the American Arbitration Association, Nathan Cayton was appointed as the third and impartial member of the Board of Arbitration. A hearing before the Board of Arbitration was set for May 2, 1957. (J. A. 10-11, 29-30, 91.)

Meanwhile, on January 30, 1957, the Union's attorney wrote to the Superintendent, Naval Gun Factory, to request the procedure and authority for the action taken against Appellant Brawner (J. A. 11-12, 31-32, 91, 95). This letter reads in part that (ibid.):

We are informed that on November 15, 1956, Mrs. Rachel Brawner, an employee of M & M Restaurants, Inc. at the Naval Gun Factory cafeteria and a member of the Union, was discharged by the employer because you or your security officer determined that Mrs. Brawner did not meet security requirements. As presently advised, we have been unable to ascertain under what authority, and in accordance with what procedure, that security determination was made. Would you therefore be good enough to apprise me of the statute, executive order, departmental regulation, and/or other basis pursuant to which this determination was made.

Under date of February 27, 1957, a reply was received from the Superintendent (J. A. 12, 32, 91, 95). This reply reads in part that (ibid.):

The written agreement entered into by the Board of Governors, U. S. Naval Gun Factory Cafeterias and M & M Restaurants, Inc. on 1 October 1955 specifies that the employees of the M & M Restaurants, Inc. who work in the Naval Gun Factory Cafeterias must meet

the basic security requirements as regards entrance to the Naval Gun Factory. It was determined that Mrs. Rachel Brawner did not meet the basic requirements and thus her pass was revoked.

On April 17, 1957, the Union, by its attorney, wrote to the Superintendent of the Naval Gun Factory to apprise him of the arbitration hearing to be held on May 2, 1957, and to state that (J. A. 12, 33-34, 91, 95):

You are invited, personally or by a representative, to attend the hearing to state your position and present evidence in its support relevant to your part, or that of your subordinates, in causing Mrs. Brawner's discharge.

No appearance was made either personally or by a representative (ibid.).

On May 2, 1957, a hearing was held before the Board of Arbitration, and a stenographic transcript of the hearing was made (J. A. 12-13, 34-70, 91). Under date of August 6, 1957, the American Arbitration Association sent to representatives of the Company and the Union the award of a majority of the Board of Arbitration in the instant matter, and the majority and dissenting opinions (J. A. 14-15, 71-89, 91). The majority of the Board of Arbitration, Samuel H. Jaffee dissenting, held that Appellant "Rachel Brawner was not discharged without good and sufficient cause. . . ." (J. A. 71). The majority based this conclusion on its view that (1) Rachel Brawner had not been discharged because the Company had expressed its willingness to reemploy her "if she could prevail on the government officials to restore her security badge" (J. A. 75), and (2) the Union should not proceed under the collective bargaining agreement to redress Brawner's discharge, but should proceed in some other way, for the "real grievance of the employee and of her Union" is not against the Company for effecting her discharge but it is against the governmental officials for causing her discharge (J. A. 76).

F. Proceedings In The District Court And
Events Transpiring After The Filing Of
The Complaint.

Thereafter, by a complaint filed on September 6, 1957, this action was instituted to redress the Company's action in effecting, and the

governmental officials' action in causing, the loss of employment suffered by Appellant Rachel M. Brawner (J. A. 2-18). Following answers and responses to interrogatories (J. A. 89-103), appellants moved for summary judgment on February 8, 1958 (J. A. 103), and governmental appellees moved to dismiss the complaint, or, in the alternative, for summary judgment in their favor, on February 27, 1958 (J. A. 103).

Meanwhile, the Concessionaire Agreement between Appellee M & M Restaurants, Inc., and the Board of Governors, Naval Gun Factory Cafeterias, which expired on January 31, 1958, had not been renewed, and since February 1, 1958, the cafeterias have been operated by a newly formed corporation known as Inplant Foods Incorporated (J. A. 107, 124). The two officers of Inplant are Harold R. Baker, President and Treasurer, who had been supervisor of the cafeterias operated by Appellee M & M Restaurants, Inc. at the Naval Gun Factory, and Claude S. Breeden, Jr., Vice-President and Secretary, who had been secretary of Appellee M & M Restaurants, Inc. (J. A. 124).

On January 16, 1958, a conference was held between Baker and Breeden, on the one hand, and Palmer and Bea, respectively business agent and president of the Union, on the other (J. A. 124). At this conference Palmer and Bea were informed that Inplant was taking over the operation of the cafeterias on February 1, 1958 (J. A. 124). The remainder of the conference was devoted to discussing and reaching agreement upon the status of the Union, the existing collective bargaining agreement, and Appellant Rachel M. Brawner (J. A. 124). Inplant recognized the Union as the exclusive bargaining representative of the employees working at the cafeterias of the Naval Gun Factory; it assumed all the obligations of the collective bargaining agreement; and it agreed to reinstate Rachel Brawner should appellants prevail in this suit (J. A. 124-130). The agreement pertaining to Brawner is that (J. A. 125, 127, 128):

The new company will reinstate Mrs. Rachel Brawner with retroactive seniority rights, and further accumulation thereafter, if, as a result of the pending suit in the United States District Court by the Union against certain government officials and M & M Restaurants, Inc.

it is held in effect that M & M Restaurants, Inc. or said government officials acted without legal authority. The new company shall, however, not be liable for back pay, except for back pay accruing after any breach by it of its refusal [sic, promise] to reinstate Mrs. Brawner as required by this paragraph.

The District Court entered an order, docketed on July 30, 1958, denying appellants' motion for summary judgment, granting governmental appellees' cross-motion for summary judgment, and dismissing the complaint as to all appellees (J. A. 132). The District Court rendered no opinion. This appeal followed (J. A. 133).

STATEMENT OF POINTS

1. The governmental appellees were and are wholly without authority, whether by way of statute, executive order, regulation, or otherwise, to formulate their own undisclosed security requirements and to cause the discharge or suspension of Appellant Rachel M. Brawner, without any explication of the underlying reasons or any opportunity to know or meet the evidence, upon their bare say-so that Rachel M. Brawner fails to meet those requirements. In the alternative, if such authority exists, its exercise constitutes a deprivation of property without due process of law in contravention of the Fifth Amendment of the United States Constitution, and abridgment of freedom of expression guaranteed by the First Amendment of the Constitution.

2. The action of the Company in discharging or suspending Appellant Rachel M. Brawner, for no reason other than the unauthorized or unconstitutional demand of the governmental appellees, constitutes a violation of Section 6 of the collective bargaining agreement with the Union by which the Company promised "not to suspend or discharge any employee without good and sufficient cause."

SUMMARY OF ARGUMENT

I

Action in the name of security is no exception to the fundamental principle that a federal officer may not act in excess of his authority or under an authority not validly conferred. Neither in public nor private employment has the United States ever authorized any governmental officer to formulate his own undisclosed security requirements and summarily to cause the discharge of an employee, without any explication of the underlying reasons or any opportunity to know or meet the evidence, upon his bare say-so that the employee fails to meet those requirements. What the United States has authorized, both in public and private employment, completely negatives the existence of the total inquisitorial power which the officers in this case presumed to exercise.

In public employment, before an employee may be discharged on security grounds, Congress has by statute provided for notice and a statement of reasons, an opportunity to submit evidence in rebuttal of the charges, and at least the rudiments of a hearing; and, indeed, as construed by the Supreme Court in Cole v. Young, 351 U.S. 536, even this authority extends only to employees holding sensitive positions. In private employment, by the Industrial Personnel Security Review Regulation promulgated by the Secretary of Defense, similar procedural safeguards have been extended to employees with access to classified information before their security clearance can be withheld or revoked; and as to employees with no access to classified information the policy of the United States is to leave them alone. It is unthinkable that what the United States does not permit as to any other employee, whether in public or private employment, it somehow authorizes as to that one group of persons in private employment who work within the Naval Gun Factory.

Of course, Section 5(b) (iii) of the Concessionaire Agreement, by which the Company agreed not to "engage, or continue to engage, . . . personnel who . . . fail to meet the security requirements or other requirements under applicable regulations of the Activity as determined

by the Security Officer of the Activity," does not confer any authority for the action taken. . All that the agreement does is to reduce to writing the arrogation of authority never conferred. The private employer can be no source of authority for action taken by the officers; authority to execute or require performance of the agreement must be derived from a source other than the agreement. The governmental appellees did not rely on the agreement in the court below. Nor could they. Furthermore, Section 5(b) of the Concessionaire Agreement, insofar as it purports to affect the wages, hours, and working conditions of the employees whom the Union represents, is invalid because in conflict with the National Labor Relations Act. Under that statute, the employer's obligation to bargain exclusively with the chosen representative of his employees exacts the negative duty to treat with no others. Section 5(b) is the product of the Company's violation of its statutory duty to treat with no other than the Union "in respect to rates of pay, wages, hours of employment, or other conditions of employment," which of course includes the terms of obtaining or retaining employment.

The miscellany upon which the governmental appellees relied upon in the court below to show authority does not begin to establish it. If any authority can be eked out of the miscellany, there is no underlying statutory basis to support any such administrative assumption of power. Finally, if any such power had been conferred it would constitute an invalid delegation, for it authorizes the officer to do as he pleases, un-governed and unchannelled by any standards.

If authority exists for the action taken, it is incompatible with due process of law. It shocks a civilized conscience to suggest that a federal officer could be constitutionally empowered to formulate his own undisclosed security requirements and summarily to cause the discharge of a person in private employment, without any explication of the underlying reasons or any opportunity to know or meet the evidence, upon his bare say-so that the employee fails to meet those requirements. Furthermore, such action is incompatible with First Amendment rights. For under

this regime of absolute governmental power the only safety of the citizen - if he is safe even then - is to speak only banalities, to read or write only commonplaces, and to associate with none about whom an eyebrow could be raised. In this environment every value that the First Amendment is designed to protect would perish.

In the court below, in an attempt to avoid the merits of the issue, the governmental appellees contended that: the complaint does not state a cause of action because neither appellant suffered an invasion of legal rights; all that is involved is a privilege which may be granted or withheld at will; and this is a suit against the United States which cannot be maintained in the absence of consent. The contentions have no merit. Appellant Brawner suffered the loss of her job, the curtailment of her opportunity for employment elsewhere, and the besmirchment of her reputation; the Union has a legally protected interest in maintaining the integrity of its collective bargaining agreement, and its status as the exclusive bargaining representative confers upon it not only the right, but the duty, to safeguard the job security of the employees it represents. The rights are real; the invasion palpable. Nor can these rights be fobbed off by a jejune appeal to the notion of privilege; control of access to property does not empower a federal officer to act in excess of authority or under an authority not validly conferred. And it is elementary that action of a public officer beyond or in want of statutory or constitutional authority may be corrected by suit against the officer individually.

II

The liability of the Company for the discharge of Appellant Brawner rests upon Section 6 of the collective bargaining agreement between the Company and the Union by which it promised "not to suspend or discharge any employee without good and sufficient cause." The Company concedes the injustice of Appellant Brawner's separation, but it defends on the ground that it was acting in compliance with the request of the Security Officer pursuant to Section 5(b)(iii) of the Concessionaire Agreement. But crucial to acceptance of, or reliance upon, a security officer's

determination is his valid authority to act. And he had none. In the absence of such authority, the status of the security officer here is simply that of a tortfeasor inducing the breach of a contract (the collective bargaining agreement between the Company and the Union) and the termination of an advantageous relationship (the employment of Rachel Brawner by the Company safeguarded by the collective bargaining agreement). The Company cannot escape its responsibility for its wrong in discharging Brawner because it contracted with another tortfeasor to commit it.

Nor is the Company's contention any better when it asserts that it had no practical alternative to yielding to the security officer's demand. The duty of a person is to resist, not to yield to, the inducement of another to commit a wrong. The Union and the Company did not contract to relieve the Company of any part of its obligation to refrain from discharging or suspending an employee without good and sufficient cause. "If unexpected impediments lie in the way, and a loss must ensue, . . . [the law] leaves the loss where the contract places it." Dermott v. Jones, 69 U.S. 1, 8.

Furthermore, as between the Company's agreement with the Union and its agreement with the Board of Governors, the choice is clear. The Concessionaire Agreement is invalid; the collective bargaining agreement is in all respects valid and proper. The Company cannot defend its failure to comply with its valid contract by pleading an inconsistent commitment in an invalid contract. Moreover, there is not the slightest reason except presumptuousness for the view that if the agreements conflict the Company is free to dishonor its contract with the Union.

The adverse award of the majority of the Board of Arbitration does not stand in the way of vindicating the Company's underlying promise not to discharge or suspend an employee without good and sufficient cause. That award is in manifest disregard of fact and law. It constitutes so imperfect an execution of the power conferred on the Board that it fails to constitute a determination of the matter submitted to it. The award

represents, not an adjudication of the merits, but a refusal to decide.

ARGUMENT

- I. THE GOVERNMENTAL OFFICERS ACTED WITHOUT AUTHORITY IN CAUSING APPELLANT RACHEL M. BRAWNER TO LOSE HER EMPLOYMENT AT THE CAFETERIA; ASSUMING THE ACTION IS AUTHORIZED, IT IS INVALID BECAUSE IN CONFLICT WITH THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS OF LAW AND FIRST AMENDMENT RIGHTS.

The central facts relevant to establishing the invalidity of the action of the appellee governmental officers in causing Appellant Rachel M. Brawner to lose her employment as a short order cook at the cafeteria are admitted. It is admitted that appellee Tyree, Superintendent of the Naval Gun Factory, and appellee Williams, security officer of the Naval Gun Factory, made a unilateral determination that Brawner "does not meet . . . security requirements [for admission to the Naval Gun Factory] and therefore entrance privileges to the Naval Gun Factory have been revoked" (supra, pp.11,12-13). It is admitted that no hearing was accorded to Brawner, the governmental officers taking the position that even a "meeting to discuss the action . . . would serve no useful purpose and is therefore unnecessary" (supra, p. 11). It is admitted that, when Brawner's identification badge was turned over to him, "the security officer gave no reason for his action, except to say he would not permit her to continue to retain the badge because her security status was in question. Neither before, then, nor thereafter did the security officer give any explanation for this conclusion to either Brawner, the Union, or the Company" (supra, pp.7-8). Indeed, there was not even disclosure of what the security requirements constitute, much less a particularization of the respects in which Brawner allegedly failed to meet them.

The question presented, therefore, is whether governmental officers may validly cause a civilian nongovernmental worker to lose her private employment without any explication of what the security require-

ments constitute, without any statement of reasons explaining the ultimate conclusion that the employee fails to meet them, and without any hearing at which to know and meet the evidence supporting the conclusion.⁶ We shall show that the action is invalid upon the grounds that (1) the governmental officers acted without authority; alternatively, (2) if authority exists, the action taken is offensive to constitutional guarantees.

A. Neither The Security Officer Nor His
Superior, The Superintendent Of The
Naval Gun Factory, Were Authorized
To Determine That Rachel Brawner Did
Not Meet Security Requirements.

It is fundamental that no right attaches "to a Federal officer acting in excess of his authority or under an authority not validly conferred." Philadelphia Co. v. Stimson, 223 U.S. 605, 620. And this is no less true because the officer acts in the name of security. Joint Anti-Fascist Refugee Com. v. McGrath, 341 U.S. 123, 140. The Supreme Court, as this Court (Coleman v. Brucker, 257 F.2d 661), has invalidated a governmental employee's removal and debarment from federal employment on the ground of a reasonable doubt as to his loyalty precisely because the action taken against him was in excess of the authority conferred by the relevant executive order. Peters v. Hobby, 349 U.S. 331; Service v. Dulles, 354 U.S. 363. And it has similarly stricken down an executive order regulating retention of federal employment because the security standards prescribed by that order were not authorized by the relevant statute. Cole v. Young, 351 U.S. 536. It was long ago held that the "right to earn a livelihood and to continue in employment unmolested" is protected against the "illegal interference or compulsion" of the Government just as it is against the "unjustified interference" of any third person. Truax v. Raich, 239 U.S. 33, 38. See also, Parker v. Lester, 227 F.2d 708, 713-714 (C.A. 9). Particularly in the field of

⁶ The liability of the Company is a separate question with which we deal infra, pp. 55 - 65 .

loyalty and security, where "'a badge of infamy' attaches" to the affected employee, and where "substantial rights affecting the lives and property of citizens are at stake" (Peters v. Hobby, 349 U.S. 331, 347), scrupulous confinement of federal officers to only such authority as is conferred is required; "they are not free to ignore plain limitations on that authority" (id. at 345). See also, Cole v. Young, 351 U.S. 536, 546-547.

We now show that, neither in public nor private employment, has the United States ever authorized any governmental officer to formulate his own undisclosed security requirements and summarily to cause the discharge of an employee, without any explication of the underlying reasons or any opportunity to know or meet the evidence, upon his bare say-so that the employees fails to meet those requirements. What the United States has authorized, both in public and private employment, completely negatives the existence of the total inquisitorial power which the officers in this case presumed to exercise.

1. Public Employment

Had Rachel Brawner worked as a short order cook in the cafeteria of the Naval Gun Factory in the capacity of a governmental employee, there is no possibility that she could have been summarily discharged as she was here.

As to civilian governmental employees, Congress has by statute (64 Stat. 476, 5 USC §22-1) provided that the Secretary of the Navy, among other enumerated agency heads, may suspend a governmental employee in the interest of national security, and "may following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final," but with this important proviso:

That any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen of the Union States whose employment is suspended under the authority of sections 22-1 to 22-3 of this title, shall be given after his suspension and before his

employment is terminated under the authority of said sections, (1) a written statement within thirty days after his suspension of the charges against him, which shall be subject to amendment within thirty days thereafter and which shall be stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter (plus an additional thirty days if the charges are amended) to answer such charges and to submit affidavits; (3) a hearing, at the employee's request, by a duly constituted agency authority for this purpose; (4) a review of his case by the agency head, or some official designated by him, before a decision adverse to the employee is made final* * *.

If there is any class of employees over whom the Government has plenary authority it is its own employees. Yet the Congress has chosen to accord a hearing and other procedural safeguards to such employees.⁷ Surely the Congress did not at the same time authorize a security officer-- or the Superintendent of the Naval Gun Factory -- to proceed against a nongovernmental employee in a manner it does not tolerate towards its own employees. Had Brawner been serving as a short order cook at the Naval Gun Factory as a governmental employee, neither the security officer nor the Superintendent could have effected her discharge as they did. They have no superior authority over, and she no inferior rights as, a nongovernmental employee.

The illuminating contrast between the manner in which these officers presumed to act toward Rachel Brawner and the rights accorded by Congress under the statute to a governmental employee is highlighted by the Supreme Court's interpretation of that statute in Cole v. Young, 351 U.S. 536. The Supreme Court interpreted the statute as applying only to governmental employees who occupy "sensitive" positions, and it struck down as unauthorized an executive order which extended the statute to all positions. The Supreme Court stated that (id. at 542-543):

⁷ We do not suggest that the hearing and procedure which is accorded is constitutionally adequate, but the point is that there is at least some hearing and some provision for self-defense. Brawner was accorded none.

The Act authorizes dismissals only upon a determination by the Secretary that the dismissal is "necessary or advisable in the interest of the national security." That determination requires an evaluation of the risk of injury to the "national security" that the employee's retention would create, which in turn would seem necessarily to be a function, not only of the character of the employee and the likelihood of his misconducting himself, but also of the nature of the position he occupies and its relationship to the "national security." That is, it must be determined whether the position is one in which the employee's misconduct would affect the "national security." That, of course, would not be necessary if "national security" were used in the Act in a sense so broad as to be involved in all activities of the Government, for then the relationship to the "national security" would follow from the very fact of employment. For the reasons set forth below, however, we conclude (1) that the term "national security" is used in the Act in a definite and limited sense and relates only to those activities which are directly concerned with the Nation's safety, as distinguished from the general welfare; and (2) that no determination has been made that petitioner's position was affected with the "national security" as that term is used in the Act.

It would be difficult to envisage a position less affected with the "national security" than Rachel Brawner's work as a short order cook. Had she worked in that job as a governmental employee, the security program would have no application to her at all. It is unthinkable that the power which Congress has denied to the Secretary of the Navy in relationship to a governmental employee it has conferred upon a Lieutenant Commander who functions as a Security Officer -- or upon a Rear Admiral who is the superintendent of a gun factory -- in relationship to a nongovernmental employee. It may be that "appellant is entitled to no more than is available to civil servants, under existing statutes and existing interpretations of the Constitution" (Greene v. McElroy, 254 F.2d 944, 951 (C. A. D. C.), cert. granted, Oct. 27, 1958); she is surely entitled to no less.

2. Private Employment

As the Court of Appeals for the Ninth Circuit has stated, "The liberty [of persons in private employment] to follow their chosen employment is no doubt a right more clearly entitled to constitutional

protection than the right of a government employee to obtain or retain his job." Parker v. Lester, 227 F.2d 708, 717. The inference is virtually irresistible that the United States would now show less scrupulous concern to protect the interest of persons in private employment in the application of its security program than it manifests towards its own employees. The inference is confirmed by consideration of the Industrial Personnel Security Review Regulation, promulgated by the Secretary of Defense upon the recommendation of the Secretaries of the Army, Navy, and Air Force, which prescribes the procedures for the security clearance of persons in private employment. 32 CFR, 1956 Supp., 67. Under that regulation, it is clear that an employee in Rachel Brawner's position is wholly outside the purview of the security program, and that, even if the program is applicable, the procedures provided do not authorize the summary action to which Rachel Brawner was subjected.

1. The security program applicable to private employers and employees is confined to those who have access to classified information. As Section 67.1-1 of the Industrial Personnel Security Review Regulation states: "This part prescribes the uniform standard and criteria for determining the eligibility of contractors, contractor employees, and certain other individuals as set forth herein, to have access to classified defense information." (Emphasis added.) See also, id. §§67.1-2(c), 67.1-6(a) (1-3). The record shows (supra, p. 8 and n. 5), and common sense confirms, that Rachel Brawner has no access to classified information; indeed the Company's supervisor of all its cafeterias at the Naval Gun Factory has none.

It is clear that the United States has no interest in, and has not authorized any of its officers to act with respect to, any private employee like Rachel Brawner who has no access to classified information. The policy of the United States as to such employees is to leave them alone.

2. Even if the security program were applicable to Rachel Brawner -- that is, even if she had access to classified information -- it is plain that the procedures authorized to determine her security clearance

negative the power which the officers here have presumed to exercise.

(a) Section 67.3-1 of the regulation provides that "Clearance shall be denied or revoked if it is determined, on the basis of all the available information, that access to classified information by the person concerned is not clearly consistent with the interests of the national security." Section 67.3-2 thereafter specifies in elaborate detail the criteria to be evaluated in making this determination. It does not, as section 5(b)(iii) of the Food Services Concessionaire Agreement presumes to permit, authorize any federal officer to formulate his own undisclosed concept of "security requirements."

(b) Section 67.4-1 of the regulation provides that "activities of military departments will not deny a clearance to a contractor or a contractor employee, and ordinarily will not suspend a previously granted clearance," except that, "in exceptional cases officials authorized by the military department concerned may suspend a clearance previously granted to a contractor employee. . . when, in the opinion of the authorized official, the contractor employee's continued access to classified information, pending action by the Screening Board, will constitute an immediate threat to the security interests of the United States." (Emphasis added.) Thus, the only summary power conferred upon a security officer is to suspend clearance where an immediate threat to security is involved, and even then his action is interim only pending action by the Screening Board. In this case, it could hardly be suggested that Rachel Brawner's continued service as a short order cook constituted an immediate threat to the security interests of the United States. Even on the ridiculous assumption that it did, the regulation requires further investigation and adjudication by others to secure a final determination of her status. The regulation confers no authority upon a security officer to snuff out the economic life of any employee without more ado than his own say-so.

(c) Except for the power of summary suspension pending action by the Screening Board where an immediate threat to security is concerned, a security officer's only authority is to "forward to the Director" of the Office of Industrial Personnel Security Review all cases prescribed in paragraph (a) of §67-16, together with the complete file, including the recommendations in the case, the reasons therefor, and all other available information and material relevant to a determination in the case." §67.4-2. The Director on receipt "will forward it to the Screening Board for appropriate action." Ibid. The Screening Board, after investigation and review, will either grant, continue, or suspend security clearance. §67.4-3(a-e). "If the Screening Board concludes . . . that the case does not warrant a security finding favorable to the person concerned, it will prepare a Statement of Reasons. The Statement of Reasons will be as specific and in as great detail as, in the opinion of the Board, security considerations permit, in order to provide the person concerned with sufficient information to enable him to prepare his defense." §67.4-3(e).

The person is afforded an opportunity to answer, to submit evidence, and, at his request, to have a hearing. §67.4-3(f). If the person does not reply, his clearance is finally denied or revoked (§67.4-3(g)(3)); if he does reply but does not request a hearing, the file is transmitted either to the Hearing Board or to the Review Board for determination (§67.4-3(g)(2)); if he requests a hearing, the file is transmitted to the Executive Secretary of the Hearing Board (§67.4-3(g)(1)). A hearing will thereafter be held, "designed to accomplish two major purposes; (1) to permit the person concerned to present evidence in his own behalf and (2) to ascertain all the relevant facts in the case to aid in reaching a fair and impartial determination." §67.4-5(a). The policy is that "every possible safeguard within the limitations of national security will be provided to ensure that no contractor or no contractor employee will be denied a clearance without an opportunity for a fair hearing." §67.1-3(a). The Hearing Board thereafter determines whether or not the granting of clearance is clearly consistent with the interests of the national security. §67.4-6(e). The determination "shall include a finding with respect

to each of the allegations set forth in the Statement of Reasons" and a "detailed discussion" of the evidence relied upon to support the finding. §67.4-6(d). And in making the determination (§67.4-6(b)):

The Board will take into consideration the fact that the person concerned may have been handicapped in his defense by the non-disclosure to him of classified information or by his lack of opportunity to identify or cross-examine persons constituting sources of information. Accordingly, it will weigh each item of derogatory information carefully in the light of its recency and relative seriousness, the amount and quality of supporting evidence, the attendant circumstances, whether the item was given under oath or affirmation, whether or not it is relevant to the Statement of Reasons, and whether or not the person concerned has had an opportunity to rebut it.

The determination by the Hearing Board is in some circumstances final and in other circumstances subject to further consideration by the Review Board. §67.4-7. The determination by the Review Board is itself subject to "Reversal by the Secretary of Defense, or reversal by the joint agreement of the Secretaries of the three military departments at the request of one of such Secretaries." §67.4-8 (c)(3).

The contrast between the authorized procedure for denying or revoking security clearance to a person in private employment and the action taken by appellee officers against Rachel Brawner could not be more glaring. The officers in this case arrogated to themselves authority which was never conferred. They presumed to pronounce final judgment with no notice, no specification of charges, no opportunity to answer or be heard, and no standards. The First Annual Report of the Industrial Personnel Security Review Program discloses that about 60 percent of the cases referred by security officers result in the grant of clearances pursuant to the procedures prescribed by the regulation.⁸ The United

⁸ First Annual Report, Industrial Personnel Security Review Program, p. 3 (1956):

To summarize the scope of operations, during the year beginning in July 1955 and ending July 31, 1956, 418 cases were considered under the program after being referred to the Director, Office of Industrial Personnel Security Review, by the three Services with a recommendation that clearance be denied or revoked. Of this number, after careful consideration, and after clarifying the available information where necessary, the Screening Board was able to conclude that a clearance should be issued in 250 cases.

(footnote continued on page 29)

States has not in this case authorized the Security Officer or the Superintendent of the Naval Gun Factory to make an ex parte determination which experience has shown results in a 60 percent incidence of error.

(d) Denial of security clearance does not require discharge of a nongovernmental employee. Section 67.1-3(b) of the regulation provides that: "Since a clearance relates only to access to classified defense information, the denial or revocation of a clearance to a contractor or contractor employee does not preclude his participation in unclassified work." As stated in the First Annual Report, Industrial Personnel Security Review Program, pp. 11-12 (1956):

One further area deserves mention in this report. Our experience over the past year indicates that a few Department of Defense contractors have been unnecessarily harsh in treating adverse decisions at any level as grounds for dismissal, rather than as a mandate to limit such an employee's access by transfer, another job, or in other ways.

The situation is complicated by the delicate position of the Department of Defense when it enters into the relations between a contractor and its employee, a matter in which the Department, although it has great concern, has no right to intrude itself.

We have at least an educational role to play under these circumstances, however, and we have taken steps to carry out that role. Conferences have been held between various segments of industry and Government officials interested in industrial security. These conferences, with their interchange of viewpoints, are useful and are being continued.

It would appear that education should begin closer at home. We cannot believe, under a regulation which states that denial of clearance "does not preclude . . . participation in unclassified work," that there

(footnote continued from preceding page)

In the remaining 168 cases, the Board concluded that a clearance was not warranted and issued a Statement of Reasons. The individuals concerned elected to default in 45 cases, and final denials were issued in accordance with the Regulation.

Fifty-one cases were decided by Board action during the year, and after careful examination in the Director's Office, 31 final denials were issued. Clearance of access to classified defense information was directed in the other 20 cases.

was the slightest authority for causing Rachel Brawner to lose her job as a short order cook in a cafeteria.

3. The Concessionaire Agreement does not confer authority upon the appellee governmental officers.

The appellee governmental officers have advanced as the basis for their action that provision of the Concessionaire Agreement under which the Company agreed not to "engage, or continue to engage, for operations under this Agreement, personnel who . . . fail to meet the security requirements or other requirements under applicable regulations of the Activity as determined by the Security Officer of the Activity" (J. A. 32-33, 59-60, 62-63, 68-69). In the court below reliance upon the Concessionaire Agreement was abandoned. It is nevertheless desirable to treat with it, because it sharpens the absence of authority for the action taken.

It is plain that, as the appellee officers are without authority in the absence of the Concessionaire Agreement, the agreement itself cannot confer any authority which does not otherwise exist. All that the agreement does is to reduce to writing the arrogation of authority never conferred. The lack of authority is no less because the officers have contracted in advance to require another to do that which they have no right to demand. Surely the private employer can be no source of authority for action taken by the officers; all that the agreement with the private employer manifests is the employer's acquiescence in the officers' demand. But authority to execute or require performance of the agreement must be derived from a source other than the agreement; and as such authority does not independently exist, the action of officers pursuant to the agreement is no more valid than action pursuant to an executive order in conflict with a statute, or a statute in conflict with the Constitution. Positing just such a case as this, A. A. Berle, Jr., recently wrote (Berle, *The 20th Century Capitalist Revolution*, pp. 96, 99 (Harcourt Brace & Co., 1954)):

Without such authority, the Federal Government has no more right to demand that the General Electric discharge the three men than you or I might have. Nor can it enlarge its

powers by any form of contract it may exact from General Electric or any other corporation. All it can do by that is to get General Electric into trouble.

* * *

This would seem to be the position of a corporation which discharges men in conformity with a clause in a government contract -- if it be found that the direction given to it by the government agency was given without valid authority, or that the procedure in applying it violated due process of law.

To rely upon the Concessionaire Agreement to validate or authorize the discharge of Appellant Brawner is indeed to attempt to lift oneself by one's own bootstraps.⁹

Furthermore, Section 5(b) of the Concessionaire Agreement, insofar as it purports to affect the wages, hours, and working conditions of the employees whom the Union represents, is in any event invalid because in conflict with the National Labor Relations Act.¹⁰ The National Labor Relations Board certified, and the collective bargaining agreement recognizes, the Union as the exclusive bargaining representative of the employees working in the cafeterias operated at the Naval Gun Factory (*supra*, pp. 3-4). Section 9(a) of the National Labor Relations Act provides that:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

"The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representative of his employees.

⁹ Furthermore, independently of all that we have already shown and will establish, the lack of authority to enter into Section 5(b)(iii) of the Concessionaire Agreement is further demonstrated by the Department of Defense regulation reported in 32 CFR, 1956 Supp., 7.104-12. That regulation sets forth the form of "Military Security Requirements" clause which is to be inserted "in all contracts which are classified by a Department as 'Confidential,' including 'Confidential-Modified Handling Authorized,' or higher and in any other contracts the performance of which will require access to such classified information or material. . . ." There is no resemblance between the required clause and Section 5(b)(iii) of the Food Services Concessionaire Agreement.

¹⁰ 49 Stat. 449 (1935), as amended, 29 U. S. C. §§ 151-68 (1952).

The obligation being exclusive, see §9(a) of the Act, 29 U.S.C. §159(a), it exacts 'the negative duty to treat with no other.' N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44; and see Virginia Ry. Co. v. System Federation, 300 U.S. 515, 548-549. "Medo Photo Supply Corp. v. N. L. R. B. 321 U.S. 678, 683-684 (emphasis added).¹¹ And, of course, "collective bargaining extends to matters involving discharge actions. . . ." Inland Steel Co. v. N. L. R. B., 170 F.2d 247, 252 (C.A. 7), cert. denied, 336 U.S. 960.

In this case, by contracting with the Board of Governors of the Naval Gun Factory to discharge employees who allegedly fail to meet the standards prescribed by Section 5(b) of the Food Services Concessionaire Agreement, the Company violated its statutory duty "to treat with no other" than the Union "in respect to rates of pay, wages, hours of employment, or other conditions of employment." A contract which is the product of an employer's violation of his statutory duty cannot stand. J. I. Case Co. v. N. L. R. B., 321 U.S. 332, 337; National Licorice Co. v. N. L. R. B., 309 U.S. 350, 364. Without the Union's concurrence in it,¹² no contract between the Company and a third party which affects wages, hours, or working conditions can bind the Union or the employees it represents. Section 5(b) of the Food Services Concessionaire Agreement, insofar as it is sought to be applied to this case, falls as a result of its incompatibility with the National Labor Relations Act.

Accordingly, Section 5(b) does not, and cannot, authorize or validate the action taken by the appellee officers against Appellant Brawner.

¹¹ See also, J. I. Case Co. v. N. L. R. B., 321 U.S. 332; Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342; May Dep't Stores v. N. L. R. B., 326 U.S. 376, 384; Ford Motor Co. v. Huffman, 345 U.S. 330, 336-340; Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192, 200; Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232, 238; Conley v. Gibson, 355 U.S. 41, 46.

¹² Not only has the Union never concurred in Section 5(b) of the Company's agreement with the Board of Governors, it did not even know of the existence of this agreement until it was uncovered in this case (J.A. 14, 48-49).

4. The miscellany upon which the governmental appellees rely does not support their claim that their action was authorized.

In the court below, citing a miscellany of matter (J. A. 108-122), the governmental appellees contended that their action was authorized.

1. We have shown that neither in public nor private employment has the United States ever authorized any governmental officer to formulate his own undisclosed security requirements and summarily to cause the discharge of an employee, without any explication of the underlying reasons or any opportunity to know or meet the evidence, upon his bare say-so that the employee fails to meet those requirements. We have shown that, as to a civilian governmental employee, Congress has by statute withheld any such power, and, indeed, as construed by the Supreme Court in Cole v. Young, 351 U.S. 536, Congress has limited the applicability of the statute to employees holding sensitive positions (supra, pp. 22-24). And, as to persons in private employment, by the Industrial Personnel Security Review Regulation promulgated by the Secretary of Defense, the power has similarly been withheld in private employment (supra, pp. 24-30). The governmental appellees' argument must come down, therefore, to the contention that what the United States does not permit as to any other employee, whether in public or private employment, it somehow authorizes as to that one group of persons in private employment who work within the Naval Gun Factory. The governmental appellees meet this insurmountable difficulty with their position by ignoring it. But the force of the showing does not cease to exist because they choose to disregard it.

2. In the court below, to show authority, the governmental appellees stated (Memo. p. 18): "During the period of her employment by the defendant Restaurant, the plaintiff Brawner's status on the premises of the Naval Gun Factory was that of a 'visitor.' *** It is clear that the Commanding Officer of the Naval Gun Factory has authority to regulate or prohibit entrance on the property under his command. His action in requiring Brawner to relinquish her badge was pursuant to lawful authority."

Principal reliance to support this contention is placed upon Chapter 14, Visitor Control, United States Navy Security Manual For Classified

Matter. It is doubtful that the governmental appellees can even rely on this manual as a source of authority in the absence of its publication in the Federal Register.¹³ But if they can, it does not support their position.

¹³ This manual is not published in the Federal Register and is not otherwise procurable by purchase. The only copy that appellants' counsel has been able to obtain is that given to him by governmental appellees' counsel. Section 3(a) of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. §1001, et seq.) explicitly provides that:

Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

The questions put by Mr. Justice Brandeis during oral argument in Panama Refining Co. v. Ryan, 293 U. S. 388, might well be asked here (Mason, Brandeis, A Free Man's Life, p. 618 (1946)):

The New Deal was introduced to the Court under most inauspicious circumstances, December 10, 1934, when government attorneys argued on behalf of the validity of certain orders of the President issued under the NIRA [National Industrial Recovery Act] which purported to authorize him to prohibit the transportation in interstate commerce of "hot oil", i. e., of oil produced in violation of state government laws. Counsel in opposition complained that their client was arrested, indicted, and held in jail several days for violating a law that did not exist. The client said he had seen only one copy of the code and that was in the "hip pocket of a government agent sent down to Texas from Washington." Brandeis was immediately aroused. Here, surely, was proof of what happens when bigness afflicts government.

"Who promulgates these orders and codes that have the force of law?" the Justice asked.

"They are promulgated by the President, and I assume they are on the record at the State Department," the government's attorney replied.

"Is there any official or general publication of these executive orders?"

"Not that I know of."

"Well, is there any way," Brandeis pursued, "by which one can find out what is in these executive orders when they are issued?"

"I think it would be rather difficult, but it is possible to get certified copies of the executive orders and codes from the NRA [National Recovery Administration]," government counsel replied somewhat lamely.

(a) To presume that the procedures for "Visitor Control" are applicable requires the assumption that Appellant Brawner is properly identified as a "visitor."¹⁴ Plainly she is not. For the full six and one-half years before her discharge on November 15, 1956, except for vacations, holidays, and very infrequent absences, Appellant Brawner worked every day at the Bellevue Annex Cafeteria, Monday through Friday, from 6:00 a. m. to 3:00 p. m. (J. A. 6, 39-41, 90, 123). It is a perversion of language to describe her as a visitor or her attendance within the Naval Gun Factory as a visit.¹⁵

(b) The Naval Gun Factory itself does not describe persons in Appellant Brawner's position as "visitors." Instead such a person is known as a "sponsored employee" (J. A. 67). The term "sponsored employee" distinguishes the person from a "Government employee" (*ibid.*). It refers to "people going to work in the Naval Gun Factory, . . . [as] in the restaurants or cafeterias, or the officers' mess, or the Navy Exchange Store... that employ civilians, but are not Government employees..." (*ibid.*). To identify Appellant Brawner as a sponsored employee, as the Naval Gun Factory does, makes sense. But to refer to her as a "visitor", despite her everyday employment within the grounds for six and one-half years, is as ridiculous as it would be to refer to a governmental employee as a "visitor."

(c) Section 1411 of the "Visitor Control" procedure, titled "Escorting Visitors", discloses on its face that this procedure has no application to a person regularly employed within the Naval Gun Factory. It states that:

¹⁴ We assume that governmental appellees' counsel will make the manual in its entirety available to the Court.

¹⁵ Webster's New International Dictionary, Second Edition, Unabridged, defines visitor as "One who makes a visit; one who comes or goes to see a person or place, as for friendship, charity, sightseeing, etc."

All visitors, except members of the United States Armed Services, who have been properly cleared, shall be escorted. "Escorts" are responsible to commanding officers to assure that the visitor has access to only that information for which he has been authorized. When available, escorts shall be members of the naval service. If a member of the naval service is not available, a competent employee of the Naval Establishment may be designated.

If Appellant Brawner were truly a "visitor," she could not be present within the Naval Gun Factory except if "escorted." Appellant Brawner, as common sense would alone manifest, has never been escorted. As she states in her uncontroverted affidavit (J. A. 122-123):

1. At no time during the full period of my employment at the Bellevue Annex Cafeteria of the Naval Gun Factory, when I came to work each morning, was I ever escorted by anyone from the gate of the Bellevue Annex to Building 65 (the place within the Annex where the cafeteria is located and where I worked). I was never escorted from Building 65 to the gate when I left work each afternoon. I had no escort at any time during any part of the day that I was within the Bellevue Annex.

2. At the time I first started working at the Annex, before the guards came to know me, upon approaching the gate in the morning to go to work, I placed my identification badge, which was suspended on a chain, about my neck. I walked through the gate without ever being stopped and proceeded directly to my place of work. The guard could observe the badge on me. He never inspected it. After I became known to the guards, I didn't put the identification badge on, because the guards knew me and let me through just on seeing me.

The same thing happened when I left work in the afternoon. At first, I put the badge on me, but after the guards came to know me, that wasn't necessary.

At no time while I was working in the cafeteria did I wear the identification badge.

(d) A reading of the "Visitor Control" procedure as a whole shows that it has no application to persons like Appellant Brawner regularly employed within the Naval Gun Factory. It is not geared to them. It has no rational relation to them. Indeed, Section 1402 states that "A visitor to a naval shore establishment is any person who is not attached to or employed by the command or staff using that station as headquarters."

(Emphasis supplied.) While a person like Mrs. Brawner is not employed by the command or staff, he would seem to be "attached to" it within the meaning of Section 1402.¹⁶

3. We have shown that the "Visitor Control" procedure of the Manual cannot fairly be said to apply to Appellant Brawner. We now show that Chapter 15 of the Manual, titled "Personnel Security Investigations And Clearances For Access To Classified Matter," affirmatively negatives the Manual as any source of authority for the action taken by the governmental appellees.

(a) Section 1501(1) of the Manual states that:

The Chief of Naval Operations (Director of Naval Intelligence), when requested by competent authority, shall be responsible for conducting security investigations of the following:

- a. Military and civilian personnel of the Naval Establishment.
- b. Private contractors and contractors' employees requiring access to classified matter. (Refer to Armed Forces Industrial Security Regulation, OPNAV Instruction 5540.8.) (Emphasis supplied.)

Section 1509, entitled "Investigation Requirements For Contractor Personnel," similarly states, "Refer to Armed Forces Industrial Security Regulation, (OPNAV Instruction 5540.8)." (Emphasis supplied.)

Appellant Brawner is properly identified as in the class of "contractors' employees" or "Contractor Personnel." In order to ascertain the status of such employees, insofar as security investigation goes, we are referred by Sections 1501(1) and 1509 to the Armed Forces Industrial Security Regulation. It is therefore appropriate to look to that Regulation to determine what authority, if any, is there conferred to support the action of the governmental appellees.

¹⁶

The inapplicability of the term "visitor" to Appellant Brawner is similarly borne out by a comparison of Articles 0733 and 0734 of the Navy Regulations (J.A. 114-115). Article 0733 refers to "Rules for Visits". But Article 0734 separately enumerates "Dealers, Tradesmen, and Agents."

The Regulation may be found at 20 Fed. Reg. 6773.¹⁷ Section 72.2-202(a) of the Regulation provides that:

Responsibility for effecting contractor personnel security clearances. (a) Those personnel security clearance actions required in connection with the granting of a facility security clearance (see §72.2-107) shall be accomplished by the Military Department assigned security cognizance of the facility. Those additional personnel security clearance actions required in connection with a contract will be accomplished by the contracting Military Department, except those which are indicated herein to be accomplished by management. When the cognizant Military Department is different from the contracting Military Department, the cognizant Military Department shall forward the completed forms required for clearance to the security office of the contracting Military Department for processing. The clearing authority shall complete all actions necessary for the granting of a personnel security clearance and will determine whether to grant the clearance or refer the case to the Director, Office of Industrial Personnel Security Review in accordance with the Industrial Personnel Security Review Regulation. Subject to the provisions of 72.2-209, any prior industrial security personnel clearance actions that may have been accomplished by any Military Department, provided these actions meet the standards prescribed in this part, shall not be duplicated, but shall be accepted by the Military Department effecting the personnel security clearance. [Emphasis supplied.]

Thus this regulation unambiguously provides that personnel security clearance of contractor personnel, if it is not to be granted, shall be referred "to the Director, Office of Industrial Personnel Security Review in accordance with the Industrial Personnel Security Review Regulation." The latter regulation is precisely that regulation which we have earlier described (*supra*, pp 24-30). And we there showed that this regulation not only does not confer, but negatives, any authority for the action

¹⁷ Codification of this regulation was discontinued on April 30, 1956. 21 Fed. Reg. 2814. It was superseded apparently in February 1957 by another regulation of identical title and substantially the same purport. The new regulation is reported in 2 Gov't. Sec. & Loy. Rep. 25:4 (Feb. 1957). We have been unable to find it in the Federal Register. Section 2-202 of the new regulation corresponds to the section quoted in the text. The underscored part of the quoted section appears in identical form in the new section except for the addition of the word "military" before the words "clearing authority." The applicability of the Industrial Personnel Security Review Regulation is further confirmed by sections 2-203(f)(1) and 2-209 of the new regulation, as it was by corresponding sections 72.2-203(f)(1) and 72.2-209 of the old regulation.

of the governmental appellees. Thus the very Manual upon which the governmental appellees now rely points unmistakably to the conclusion of lack of authority.

(b) As we have shown, the Industrial Personnel Security Review Regulation is not applicable to a contractor employee, like Appellant Brawner, who has no access to classified information; the policy of the United States as to such employees is to leave them alone (supra, p. 25).

The Manual upon which the governmental appellees now rely implicitly recognizes this. The opening footnote to Chapter 15, concerning "personnel security investigations," states that:

The provisions of this chapter relate only to the investigative and clearance requirements for access to classified matter and have no bearing on the investigative requirements for employment of civilian personnel within the Naval Establishment or the acceptance of personnel for the naval service. Requirements relating thereto are contained in appropriate instructions issued by the Bureau of Naval Personnel, the Office of Industrial Relations, Commandant of the Marine Corps, or higher authority.

We have been directed to no instructions, presumably because there are none, issued by the Office of Industrial Relations authorizing the action of the governmental appellees.

4. In the court below the governmental appellees referred fleetingly to Department of Defense Directive 5200.8 (J. A. 119-122). The relevance of the Directive is not apparent upon a reading of it. It may be noted, in addition, that Section V(B) of the Directive states that (J. A. 122): "Regulations issued pursuant hereto shall be posted in a conspicuous and appropriate place, and shall make appropriate citation of this designation and the Public Law under which the designation is made." We are referred to no regulations issued "pursuant hereto". So far as appears, whatever authority might be conferred by this Directive to promulgate regulations has not been exercised to any degree relevant to the question here.

5. The lack of authority is further shown by the consideration of three factors.

(a) The Superintendent of the Naval Gun Factory ~~has~~ never relied upon any of the purported sources of authority which the governmental appellees now tender. On the contrary, he has explicitly stated, in the context of direct inquiry on the subject, that he relied upon Section 5(b) (iii) of the Concessionaire Agreement (J. A. 32-33, 59-60). Surely if the sources now tendered were in fact in point, the Superintendent would have known of them and invoked them. And in the court below the governmental appellees did not challenge our position that the Concessionaire Agreement, as we have shown, does not constitute a valid source of authority (supra, pp.30-32).

(b) Whenever the United States has in fact intended to control employment, either public or private, on the basis of security requirements, it has manifested its intention unequivocally, whether by statute, executive order, or regulation. This is true of government employees (64 Stat. 476, 5 USC §22-1; Cole v. Young, 351 U.S. 536), of private employment (Industrial Personnel Security Review Regulation, 32 CFR, 1956 Supp., 67), and of merchant seamen (Parker v. Lester, 227 F.2d 708 (C.A. 9)). It has never been content with the anonymities which the governmental appellees now invoke. It has always published the relevant documents in the Federal Register whether these were an executive order or a regulation. And the documents have never been such that it was necessary to guess that their meaning was directed to controlling employment on the basis of security requirements.

(c) The Supreme Court has firmly established that, if employment is to be governed by security requirements, the authority must be explicitly stated, and will not be enlarged upon by implication. Peters v. Hobby, 349 U.S. 331; Cole v. Young, 351 U.S. 536; Service v. Dulles, 354 U.S. 363. See also, Coleman v. Brucker, 257 F.2d 661 (C.A. D.C.). This was again illustrated by the Supreme Court in directly related contexts just recently. Harmon v. Brucker, 355 U.S. 579, 581-583; Kent v. Dulles, 357 U.S. 116, 128-130. This approach reflects concern for the

"substantial rights affecting the lives and property of citizens [which] are at stake" (Peters v. Hobby, 349 U.S. 331, 347); it also reflects deference to the "duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case" (Harmon v. Brucker, 355 U.S. at 581). The sources of authority now tendered by the Government do not begin to measure up to the tight test of authority that the Supreme Court decrees.

6. Even if it could be said that the miscellany relied upon by the governmental appellees authorized their action, there is no underlying statutory authority to support any such administrative assumption of power. In the absence of statutory authority, any subsidiary administrative regulation is itself without sanction. The "right to work" has frequently been "included in the concept of 'liberty'" (Railway Employees' Dep't. v. Hanson, 341 U.S. 225, 234), and if "that 'liberty' is to be regulated, it must be pursuant to the law-making functions of Congress." Kent v. Dulles, 357 U.S. 116, 129.

This aside, if any authority can be derived from the miscellany, it comes down to authorizing the Superintendent of the Naval Gun Factory to do as he pleases. "No standards are specified. . . . No criteria are available" Pederson v. Benson, 255 F.2d 524, 527 (C.A.D.C.). The Superintendent is bounded by nothing but his uncontrolled will. To place such unchannelled and ungoverned power in the hands of an official is itself an invalid delegation of authority.

This Court's decision in Pederson v. Benson, *supra*, illustrates the point. A subordinate of the Secretary of Agriculture, acting under the latter's authority, refused to release appellant's giraffe which was held by the official pursuant to purported authority vesting "unregulated discretion" in him (255 F.2d at 527). Appellant successfully sued to secure the release of the giraffe. Said the Court, "we perceive no basis, and none has been demonstrated, upon which a government officer may impose an ad hoc system of licensure upon any citizen" (*id.* at 528); "here we find no regulations, no prescribed standards, no proscription

by statute or otherwise" (*ibid.*); "He may . . . issue valid regulations to effectuate the statutory intention. But he must issue them only in accordance with prescribed standards -- he may not 'exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable****' and 'they are valid only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined'" (*id.* at 529).

We think a man's job is as important as a man's giraffe. The Superintendent of the Naval Gun Factory, no more than the bureau chief of the Department of Agriculture, can be authorized to do as he pleases. If such power has been delegated, the delegation is fatally defective, for there are no standards "adequate to pass scrutiny by the accepted tests." Kent v. Dulles, 357 U.S. 116, 129.

7. Perhaps as good a demonstration of the lack of authority of appellee officers to cause the discharge of Appellant Brawner is their answer to the interrogatory directed to this question. Appellee officers were asked to "state in detail the authority by which you support the action taken by you" (J.A. 98). Their answer to this interrogatory is that (J.A. 100):

This interrogatory calls for a conclusion of law which defendants are not required to answer, however the defendants refer the plaintiffs to the following.

The United States Constitution.

The United States Code and United States Statutes
at large.

United States Navy Regulations, 1948, as amended.

United States Navy Security Manual for Classified
Information.

This contemptuous and arrogant response is characteristic of the high-handed action of the appellee officers in this case. It bespeaks manifest disregard of authority rather than scrupulous concern to stay within its bounds.

B. Assuming The Action Of Appellee Officers Was Authorized, Such Action Is Incompatible With Constitutional Guarantees.

If it could be said that the appellee officers' action were authorized, it is plain that no authority which would permit action of the kind taken in this case would be compatible with due process of law. It shocks a civilized conscience to suggest that a federal officer could be constitutionally empowered to formulate his own undisclosed security requirements and summarily to cause the discharge of a person in private employment, without any explication of the underlying reasons or any opportunity to know or meet the evidence, upon his bare say-so that the employee fails to meet those requirements.

We cannot add to what Mr. Justice Frankfurter said in concurrence in Joint Anti-Fascist Refugee Com. v. McGrath, 341 U.S. 123, 160-174, in condemning the Attorney-General's designation of an organization as subversive without notice or hearing. He stated in part (id. at 161-162, 165-166, 170, 171-172):

Yet, designation has been made without notice, without disclosure of any reasons justifying it, without opportunity to meet the undisclosed evidence or suspicion on which designation may have been based, and without opportunity to establish affirmatively that the aims and acts of the organization are innocent. It is claimed that thus to maim or decapitate, on the mere say-so of the Attorney General, an organization to all outward-seeming engaged in lawful objectives is so devoid of fundamental fairness as to offend the Due Process Clause of the Fifth Amendment.

Fairness of procedure is "due process in the primary sense." Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 US 673, 681. It is ingrained in our national traditions and is designed to maintain them. In a variety of situations the Court has enforced this requirement by checking attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of fair play enshrined in the Constitution. "[T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of

persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, ..." Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86, 100, 101. "[B]y 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought." Hagar v. Reclamation Dist. 111 US 701, 708. "Before property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts." Southern R. Co. v. Virginia, 290 U.S. 190, 199. "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." Brinkerhoff-Faris Trust & Sav. Co. v. Hill, supra, 281 US at 682.

* * * *

The construction placed by this Court upon legislation conferring administrative powers shows consistent respect for a requirement of fair procedure before men are denied or deprived of rights. From a great mass of cases, running the full gamut of control over property and liberty, there emerges the principle that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning. [Cases cited.] Fair hearings have been held essential for rate determinations and, generally, to deprive persons of property. An opportunity to be heard is constitutionally necessary to deport persons even though they make no claim of citizenship, and is accorded to aliens seeking entry in the absence of specific directions to the contrary. Even in the distribution by the Government of benefits that may be withheld, the opportunity of a hearing is deemed important.

* * * *

The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

* * * *

Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

And the evil is compounded, as Mr. Justice Douglas observed in concurrence in Joint Anti-Fascist Refugee Committee, when it is the rights of the individual which are at stake (id. at 178). As he also stated (ibid.):

Notice and opportunity to be heard are fundamental to due process of law. We would reverse these cases out of hand if they were suits of a civil nature to establish a claim against petitioners. Notice and opportunity to be heard are indispensable to a fair trial whether the case be criminal or civil. [Cases cited.] The gravity of the present charges is proof enough of the need for notice and hearing before the United States officially brands these organizations as "subversive." No more critical governmental ruling can be made against an organization these days. It condemns without trial. It destroys without opportunity to be heard. The condemnation may in each case be wholly justified. But government in this country cannot by edict condemn or place beyond the pale. The rudiments of justice, as we know it, call for notice and hearing -- an opportunity to appear and to rebut the charge.

Nor can we add to what the Court of Appeals for the Ninth Circuit has stated in Parker v. Lester, 227 F.2d 708 (C. A. 9). In that case, under an executive order¹⁸ issued pursuant to the Magnuson Act,¹⁹ seamen must have security clearance to serve on merchant vessels, which

¹⁸ Exec. order No. 10173, 15 Fed. Reg. 7005, 7007.

¹⁹ 64 Stat. 427, 50 U. S. C. §§ 191, 192, 194.

the Commandant of the Coast Guard grants if he is "satisfied that... the presence of the individual on board would not be inimical to the security of the United States." The plaintiffs in individual and class actions representing at least 150 others had been denied clearance after hearings which did not include presentation of evidence against them. The Court of Appeals stated the issue: "Is this system of secret informers, whisperers and tale bearers of such vital importance that it must be preserved at the cost of denying to the citizen even a modicum of the protection associated with due process?" 227 F.2d at 719. It concluded that "the system of screening here under attack constitutes a violation of due process" (*id.* at 720), declaring that "the time has not come when we have to abandon a system of liberty for one modeled on that of the Communists" (*id.* at 721). What was condemned in Parker v. Lester is pale by comparison with what was done in this case.

Recently, in entertaining a suit by a governmental employee for loss of his job, where the employee's tenure was wholly outside any statutory protection, this Court stated that: "Persons situated as was the appellant are, we may assume, entitled to be free from dismissal on unconstitutional or flagrantly arbitrary grounds." Vitarelli v. Seaton, 253 F.2d 338, 341, cert. granted, Oct. 27, 1958. The dismissal was sustained because the employee had been "given written charges, and an opportunity to answer them, together with a hearing." *Id.* at 342. Appellant Brawner, on the other hand, was given no charges, written or otherwise, no opportunity to answer, and no hearing. And, if anything, her interest in freedom from governmental interference with her private employment is superior to a governmental employee's interest in public employment. "The liberty [of persons in private employment] to follow their chosen employment is no doubt a right more clearly entitled to constitutional protection than the right of a government employee to obtain or retain his job." Parker v. Lester, 227 F.2d 708, 717 (C.A. 9). The only alternative to saying that Appellant Brawner was denied due process is to say that she is entitled to none.

Not only is this total subjection of the individual to the uncontrolled will of the officers offensive to due process of law (Yick Wo v. Hopkins, 118 U. S. 356, 366-367); it also conflicts with the freedoms of speech, press, and lawful assembly guaranteed by the First Amendment. Under the regime of absolute governmental power manifest by this case the only safety of the citizen against official oppression -- if he is safe even then -- is to speak only banalities, to read or write only commonplaces, and to associate with none about whom an eyebrow could be raised. Anything less than unrelieved anonymity exposes the individual to the risk of governmental condemnation as a security risk without even the right to know the why or the where, much less to defend. In this environment every value that the First Amendment is designed to protect against governmental abridgment would perish. That the encroachment upon these values is indirect does not make it constitutionally less objectionable. N.A.A.C.P. v. Alabama, 357 U. S. 449, 461; Speiser v. Randall, 357 U. S. 513, 518-519. So long as the First Amendment stands, the action of the appellee officers cannot. See, in addition to NAACP and Speiser, Watkins v. United States, 354 U. S. 178; Sweezy v. New Hampshire, 354 U. S. 234.

The Solicitor General of the United States decided not to seek certiorari in Parker v. Lester, supra. As Professor Davis has stated, "The Solicitor General's decision not to seek Supreme Court review of the Parker case gives it special significance, for it establishes the Government's policy of allowing seamen a chance to meet the evidence against them before they can be denied clearance to serve on American vessels."²⁰ We do not believe a different policy ought to be imputed to the Government in dealing with short order cooks working in cafeterias in the Naval Gun Factory. And the inference of lack of authority especially commends itself, for a conclusion that the action of the appellee officers in this case is authorized raises the gravest questions of constitutional

²⁰ Davis, "The Requirement Of A Trial-Type Hearing," 70 Harv. L. Rev. 193, 239 (1956).

validity. It is elementary that that construction is to be adopted which avoids constitutional doubts.²¹ "That precept, of course, applies to this court as well as to the Supreme Court." Coleman v. Brucker, 257 F.2d 661, 662 (C. A. D. C.).

C. Appellants Suffered An Invasion Of Their Legal Rights; Those Rights Cannot Be Exorcised By Describing Them As A Privilege; And The District Court Has Jurisdiction To Vindicate Them.

In the court below, in an attempt to avoid the merits of the issue, the governmental appellees contended that: the complaint does not state a cause of action because neither appellant suffered an invasion of legal rights; all that is involved is a privilege which may be granted or withheld at will; and this is a suit against the United States which cannot be maintained in the absence of the Government's consent. The contentions are without merit.

1. Appellants Have Suffered Judicially Cognizable Injuries.

It is clear that "the claims presented . . . may be entertained by the District Court because . . . [appellants] have alleged judicially cognizable injuries." Harmon v. Brucker, 355 U.S. 579, 582.

(a) The injury to Appellant Brawner: As a result of the action of the governmental appellees Brawner was deprived of her job at the Bellevue Annex cafeteria which she had held for six and one-half years. Appellant Brawner suffered an invasion of her legal rights if the loss of a job is a legally cognizable injury. And of course it is. "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to

²¹ United States v. Rumley, 345 U.S. 41, 45-46; Peters v. Hobby, 349 U.S. 331, 338; United States ex rel. Attorney General v. Delaware and Hudson Co., 213 U.S. 366, 408.

secure." Truax v. Raich, 239 U. S. 33, 41. It has "frequently" been "included in the concept of 'liberty'" Railway Employees' Department v. Hanson, 351 U. S. 225, 234.

In Truax v. Raich, the employee sought an injunction restraining his employer from complying with, and state officials from enforcing, a statute which unconstitutionally required the employer to discharge the employee. Rejecting the argument that the employee had no legally protected interest in his job because it was "an employment at will," the Supreme Court explained that (239 U. S. at 38):

The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will.

Appellant Brawner stands in an a fortiori position. For her employment was not at will. The collective bargaining agreement safeguarded her against discharge or suspension "without good and sufficient cause" (supra, p. 4). She surely has a legally protected interest against the "unjustified interference" with the retention of her employment.

Similarly, in Parker v. Lester, 227 F.2d 708 (C. A. 9), the Court of Appeals for the Ninth Circuit held that merchant seamen had a legally protected interest in obtaining employment, and it struck down a security clearance system which unconstitutionally interfered with securing a job. Said the Court (id. at 713-714):

The rights which plaintiffs seek to enforce and preserve are similar to those recognized and enforced in Truax v. Raich, 239 U. S. 33. Although the employment of which plaintiffs were deprived was prospective only, yet their right to earn a livelihood, like that in Truax, was entitled to protection at the hands of a court of equity.

The loss of her job is not the only (although it is enough) legally cognizable injury which Appellant Brawner suffered. The action of the governmental appellees drastically impaired her opportunity to obtain

employment elsewhere. It also besmirched her reputation. As Oliver T. Palmer, business agent of the Union, testified at the arbitration hearing (J. A. 52):

An employee who may be discharged as a security risk has not a ghost of a chance of getting a job in a Government cafeteria, and it is very difficult to obtain employment for any employee who has that tag on them, in any cafeteria. That is a problem, and if they have that tag, it is almost impossible to find them another job.

The short of the matter is that, from Truax v. Raich, 239 U. S. 33, through Service v. Dulles, 354 U. S. 363, courts of equity have vindicated the interest of the employee in freedom from unjustified governmental interference with his employment. Wieman v. Updegraff, 344 U. S. 183; Slochower v. Board of Higher Educ., 350 U. S. 551; Peters v. Hobby, 349 U. S. 331; Cole v. Young, 351 U. S. 536; Coleman v. Brucker, 257 F. 2d 661 (C. A. D. C.). And in Greene v. McElroy, 254 F. 2d 944, cert. granted, Oct. 27, 1958, while sustaining the validity of the Government's action in causing Greene's discharge from private employment, this Court stated "We have no doubt that Greene has in fact been injured" (*id.* at 952), "Nor do we doubt that, following the Government's action, some stigma, in greater or less degree, has attached to Greene" (*id.* at 953).²²

(b) The interest of Appellant Union: The Union too has a legally protected interest which the action of the governmental appellees invades.

The Union is the party to the collective bargaining agreement by which the Company promised not to discharge or suspend employees "without good and sufficient cause" (*supra*, p. 4). The action of the governmental appellees derogates from that contract. Surely the Union has a legally protected interest in maintaining the integrity of its agreement. Tennessee Electric Power Co. v. T. V. A., 306 U. S. 117, 137.

²² It should be recalled that Greene was accorded at least the procedural safeguards conferred by the Industrial Personnel Security Review Regulation, and the predecessor regulation (254 F. 2d at 946-947), the very safeguards denied Appellant Brawner (*supra*, pp. 24-30).

The Union is also the exclusive bargaining representative of the employees working at the cafeterias of the Naval Gun Factory (supra, pp. 3-4, 14). That status confers upon it the authority and responsibility to represent the employees concerning wages, hours, and working conditions, including the terms of obtaining and retaining employment (supra, pp. 31-32). The employees at the cafeterias range in number from 30 to 35 (J. A. 124). The action taken by the governmental appellees is not confined to Appellant Brawner; the governmental appellees assert the power to do the same to anyone of the other 30 to 35 employees should they see fit. It is not simply the Union's right, but its duty, to safeguard the employees it represents from this threat to their job security. The Union's status as the employees' representative manifestly confers upon it full legal interest to maintain this action against the governmental appellees in its own right. "The National Labor Relations Act, as amended, gives a bargaining representative not only wide responsibility but authority to meet that responsibility." Ford Motor Co. v. Huffman, 345 U.S. 330, 339. The Union's nexus with the employees it represents suffices to confer standing upon it. N. A. A. C. P. v. Alabama, 357 U.S. 449, 458-460.

2. The Notion of Privilege.

Disdaining to take cognizance of the injuries they have demonstrably inflicted and the legal interests they have plainly invaded, the governmental appellees asserted in the court below that all that is involved is the privilege of access to property it owns. But it is not bare access to the premises, unaffected by any other interest, which is involved. It is the loss of a job and the besmirching of a reputation which are at stake. Debarment from the grounds without these consequences would be one thing; with these consequences, it is quite another. A man's home may be his castle, but that does not mean he may drive his wife and children from it. Nor does the Government's ownership of the premises on which the Naval Gun Factory is located mean that officials may destroy the employment and besmirch the reputation of persons working within the grounds.

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Control of access to governmental property does not empower a federal officer to act in excess of his authority or under an authority not validly conferred. Otherwise no governmental employee could ever have successfully challenged his ouster from public employment on security grounds. For the short answer to his protest would have been that the government cannot be required to permit him to work in a building it owns and from which his entry could be barred. But the Supreme Court has required the restoration to public employment of governmental employees, both because the ouster was in excess of the authority conferred (Cole v. Young, 351 U.S. 536; Peters v. Hobby, 349 U.S. 331; Service v. Dulles, 354 U.S. 363), and because the authority conferred was constitutionally invalid (Wieman v. Updegraff, 344 U.S. 183; Slochower v. Board of Higher Educ., 350 U.S. 551). See also, Coleman v. Brucker, 257 F.2d 661 (C.A.D.C.).

In a related context, where a governmental manager, installed by a federal agency to supervise a village owned by the federal government, denied a person the right to religious proselytism in that village, the Supreme Court held it to be no defense that "the federal Government owns and operates the village. **** Certainly neither Congress nor Federal agencies acting pursuant to Congressional authorization may abridge the freedom of press and religion safeguarded by the First Amendment." Tucker v. Texas, 326 U.S. 517, 520. As the Supreme Court said of a company-town wholly owned by a corporation, so with the premises of the Naval Gun Factory wholly owned by the Government, "We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Marsh v. Alabama, 326 U.S. 501, 505-506. Within out scheme of limited powers, federal officers are not lords of the manor

empowered to act without authority or under invalid authority.

Thus, to cry privilege is not to exorcise constitutional rights, for "conditions imposed upon the granting of privileges or gratuities must be 'reasonable.'" Speiser v. Randall, 357 U.S. 513, 518. The serious injuries suffered and the serious legal interests asserted by the appellants cannot be therefore fobbed off by a jejune appeal to the notion of privilege.²³

3. Sovereign immunity.

Upon the premise that this action constitutes a suit against the United States which cannot be maintained in the absence of the Government's consent, the governmental appellees in the court below wrote a lengthy and irrelevant essay on sovereign immunity. The doctrine of sovereign immunity has no application to this case. As the governmental appellees admitted in the court below, "Equity has jurisdiction to restrain a federal officer from doing or attempting to do acts which are in excess of his authority or under authority not validly conferred..." (Memo. p. 14). The complaint in this case is predicated precisely on the theory that the action taken by the governmental appellees is unauthorized; alternatively, if authorized, the action taken offends constitutional guarantees (J. A. 15). That an officer acts in the name of security does not mean that he may act in excess of his authority or under an authority not validly conferred (supra, pp.21-22). And so this case is within the "elementary" proposition "that action or inaction of a public officer beyond or in want of statutory (or constitutional) authority may be corrected by suit against the officer individually and that the Government is not, under such circumstances, a necessary party. . . ." West Coast Exploration Co. v. McKay, 213 F.2d 582, 596 (C.A.D.C.), cert. denied, 347 U.S. 989. See also, Clackamus County v. McKay, 219 F.2d 479, 491 (C.A.D.C.), dismissed as moot, 349 U.S. 909.

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The Supreme Court's decision in Harmon v. Brucker, 355 U. S. 579, is a recent illustration of the proposition. There, the Supreme Court held that the Secretary of the Army was without authority to issue a discharge certificate in form other than "honorable" based on the soldier's preinduction activities, which, the Secretary found, showed that the soldier was a security risk. The Supreme Court rejected the Government's contention that the "courts are without jurisdiction to review those findings." It held that (id. at 581-582):

In keeping with our duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case, we look first to petitioners' nonconstitutional claim that respondent acted in excess of powers granted him by Congress. Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers. [Cases cited.] The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us, judicial relief from this illegality would be available.

There is, accordingly, no question but that the District Court has jurisdiction to determine whether the action of the governmental appellees was authorized, and, if authorized, constitutional.²⁴

²⁴ There is also no question but that, if their action is unauthorized or unconstitutional, the governmental appellees are answerable in money damages to compensate Appellant Brawner for the harm caused her. Damages are not recoverable against a governmental officer where the claim is based on action which, although within the scope of valid authority, is taken from an improper motive. But that immunity exists only when the officers are "acting within the scope of their official authority...." Jones v. Kennedy, 73 App.D. C. 292, 121 F.2d 40, 42, cert. denied, 314 U.S. 665. "The decisions have, indeed, always imposed as a limitation upon the immunity that the official's acts must have been within the scope of his powers...." Gregoire v. Biddle, 177 F.2d 579, 581 (C.A.2). See also, Spalding v. Vilas, 161 U.S. 483, 498-499; Cooper v. O'Connor, 69 App.D. C. 100, 99 F.2d 135, 137-138; Gibson v. Reynolds, 172 F.2d 95, 98-99 (C.A.8), cert. denied, 337 U.S. 925 (The question here is, as it is in all cases where this doctrine of immunity is advanced, were these officials acting within the scope of their authority in the performance of the duties of their respective offices?) And so, where, as here, the gravamen of the claim is not improper motive, but action in excess of authority or authority not validly conferred, damages are recoverable if the claim is established. For the officer is then "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." Ex parte Young, 209 U.S. 123, 160.

II. APPELLANT BRAWNER WAS DISCHARGED BY THE COMPANY, IN VIOLATION OF SECTION 6 OF THE COLLECTIVE BARGAINING AGREEMENT, "WITHOUT GOOD AND SUFFICIENT CAUSE."

The liability of the Company for the discharge of Appellant Brawner rests upon Section 6 of the collective bargaining agreement between the Company and the Union by which the Company agreed "not to suspend or discharge any employee without good and sufficient cause" (supra, p. 4). The provision safeguarding an employee against discharge or suspension "without good and sufficient cause" means that the test for retention in employment is whether the employee is a fit worker. Appellant Brawner clearly satisfies this test. Indeed, as the Company admits, "The employment record of Mrs. Brawner was completely satisfactory and she was above average in the discharge of her duties" (supra, p. 5).

The injustice of Appellant Brawner's discharge is not disputed. As the Chairman of the Board of Arbitration stated at the arbitration hearing (J. A. 69-70):

... what opportunity did this woman have to state her case or to obtain any information, or get any clarification of the reason for the picking up of her badge, which is of course the pivotal or crucial step in this whole proceeding?

All she was told was "surrender your badge", and despite efforts by the Union, and by the Union counsel, to this day she has not been told what the charge is against her.

* * *

Not only was there no hearing or no clarification or no specification, but not even a statement on which the ultimate conclusion was reached. It was just said that she was not satisfactory from a security standpoint, which may mean anything.²⁵

²⁵ That it "may mean anything" is underscored by the Supreme Court's decision in Cole v. Young, 351 U.S. 536, where the Court observed, in discussing the criteria laid down in an executive order for determining whether a governmental employee's retention in employment "is clearly consistent with the interests of national security," that these criteria include "non-loyalty--oriented facts which, in general, might reflect upon the employee's reliability, trustworthiness, or susceptibility to coercion, such as dishonesty, drunkenness, sexual perversion, mental defects, or other reasons to believe that he is subject to influence or coercion" (id. at 553).

And as the Company's designee on the Board of Arbitration stated on behalf of the Company at the hearing (J. A. 70): "Our position is heartily in accord with the viewpoint of the Union on this, and we are in entire agreement and we hold no brief for the Security Officer's actions. . . ."

Nevertheless, the Company contends that it is not answerable for an unjust discharge which it effects, because it was acting at the behest of the appellee Security Officer pursuant to Section 5(b)(iii) of the Concessionaire Agreement. Had the Company, acting upon its own initiative, discharged Appellant Brawner without more justification than its bare assertion that her security was in question, there would be no doubt that her dismissal would be "without good and sufficient cause." Had the Company, acting upon the request of a private person or organization, discharged Appellant Brawner without more justification than the bare assertion of the private person or organization that her security was in question, there would equally be no doubt. The essential question, therefore, is whether the identical discharge, because it is effected at the request of a governmental security officer, is for that reason with good and sufficient cause. For whether done on the Company's own initiative, at the request of a private firm or organization, or at the request of a governmental security officer, the characteristics of the discharge are identical: it is a dismissal effectuated without any explication of what the security requirements constitute, without any statement of reasons explaining the ultimate conclusion that the employee fails to meet them, and without any hearing at which to know and meet the evidence supporting the conclusion.

We have shown that the Security Officer's action towards Appellant Brawner is invalid. It follows that the Company cannot rely upon his wrong to validate its discharge of her. Crucial to the acceptance of, or reliance upon, a security officer's determination is his authority to act. Peters v. Hobby, 349 U.S. 331; Cole v. Young, 351 U.S. 536; Service v. Dulles, 354 U.S. 363. In the absence of valid authority to act, the status of the Security Officer here is simply that of a tortfeasor inducing

the breach of a contract (the collective bargaining agreement between the Company and the Union) and the termination of an advantageous relationship (the employment of Rachel Brawner by the Company safeguarded by the collective bargaining agreement).

The Company cannot escape its responsibility for its wrong in discharging Rachel Brawner because it contracted with another tortfeasor to commit it. The fact that the Company's action was induced by the Security Officer does not minimize its own answerability as a wrongdoer. The liability of the person who commits the wrong subsists although the person who induced its commission is also liable for the harm inflicted. Hornstein v. Podwitz, 254 N. Y. 443, 173 N. E. 674, 675-676.

Nor is the Company's contention any better when it asserts that it had no practical alternative to yielding to the Security Officer's demand. Assuming that to be so, it provides no defense. The duty of a person is to resist, not to yield to, the inducement of another to commit a wrong. See Cooper v. Aaron, 3 L. Ed. 2d 5, 15-16. It is no defense to murder that a third person forced the accused to commit the crime by a threat that if he did not he himself would be murdered.²⁶ If the Company is caught in a squeeze, the solution is not to pass the pinch to the employee. The Union and the Company did not contract to relieve the Company of any part of its obligation to refrain from discharging without good and sufficient cause; and the law leaves a party where his contract has placed him. The principle rests upon a "solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way,

²⁶ It has never been doubted that the person who commits the wrong is liable, and it long ago ceased to be doubted that the person who induces it is also liable. Compare, Holmes, "Privilege, Malice, And Intent," in Collected Legal Papers, p. 133, (Harcourt, Brace and Co., 1920): "There is no doubt, of course, that a man may be liable for the unlawful act of another, civilly as well as criminally, and this is now pretty well agreed when the act is a breach of contract as well as when it is a tort. He is liable, if having authority he commands it; he may be liable if he induces it by persuasion. I do not see that it matters how he knowingly gives the other a motive for unlawful action, whether by fear, fraud, or persuasion, if the motive works." See Judge Learned Hand's brilliant summary of the evolution of the "long settled principles of civil and criminal liability" that "he, who provokes or instigates a wrong, makes himself a party to the wrong, and is equally liable with the perpetrator." I. B. E. W. v. N. L. R. B., 181 F. 2d 34, 38-39 (C. A. 2), affirmed, 341 U. S. 694, 704.

and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated." Dermott v. Jones, 69 U.S. 1, 8.

Furthermore, as between the Company's agreement with the Union and its agreement with the Board of Governors, the choice is clear. Unlike the collective bargaining agreement, which is in all respects valid and proper, Section 5(b)(iii) of the Concessionaire Agreement is invalid; as we have shown, the defendant officers were without authority to execute or enforce it (supra, pp.22-42), it conflicted with the National Labor Relations Act (supra, pp.31-32), and it is in any event an unconstitutional exercise of governmental power (supra, pp.43-48). Obviously the Company cannot defend its failure to comply with its valid contract with the Union by pleading an inconsistent commitment in an invalid contract. Moreover, the Union's agreement with the Company has at least the same solemnity and dignity as the Company's agreement with the Board of Governors. The Union has had agreements with the Company safeguarding employees against discharge without good and sufficient cause ever since the Company first began to operate at the Naval Gun Factory (supra, p. 4). The Union has never concurred in the Company's contract with the Board of Governors; indeed it did not even know of its existence until uncovered in this case (J. A. 14, 48-49). There is not the slightest reason except presumptuousness for the view that if the agreements conflict the Company is free to dishonor the contract with the Union.

Finally, the logic of the Company's contention that it is not answerable for an unjust discharge which it effects at the behest of the Security Officer is not confined to dismissals made in the name of security. For the Company asserts that its immunity stems from Section 5(b) of the Food Services Concessionaire Agreement with the Board of Governors. If that agreement controls, the Company could discharge or suspend an

*make it read when Gov't shall find cause
I think M+M can beat this*

employee with impunity if that employee allegedly does not meet the "other requirements under the applicable regulations of the Activity, as determined by the Security Officer of the Activity" (J. A. 6, sec. 5(b)iii, emphasis added); or if the employee is allegedly "not courteous, conscientious and competent" and for that reason discharge is requested by the Board of Governors (J. A. 6, sec. 5(b) ii), or, similarly, if the Board of Governors requests the discharge of an employee for allegedly failing to "pass satisfactory medical examinations" (J. A. 6, sec. 5(b) i). The upshot is that acceptance of the Company's contention means that, as to any discharge or suspension effected in compliance with virtually any request made by the Security Officer or the Board of Governors, the protection extended by the collective bargaining agreement against dismissal "without good and sufficient cause" is nullified. Certain it is that Section 6 of the collective bargaining agreement does not in terms express, and its spirit does not allow, surrender to a third person of arbitrary control over employment which is withheld from the employer itself.

In short, the Company's compliance with the Security Officer's invalid demand, far from excusing its failure to refrain from discharging or suspending an employee "without good and sufficient cause", but serves to emphasize the injustice done Appellant Brawner.

The only question which remains is whether the award of a majority of the Board of Arbitration that "Rachel Brawner was not discharged without good and sufficient cause" (J. A. 71) constitutes a conclusive determination in favor of the Company. It should be observed that the arbitration clause here does not contain the usual provision making awards final and binding (J. A. 19). An arbitral award may ordinarily not be impeached for mere error of fact or law. But an award may be vacated where, as here, it is based upon one or more of the following fundamental defects: the award is founded upon "a basic mistake of fact";²⁷ it is in "manifest disregard" of the law;²⁸ it is so foreign to

²⁷ Williston, Contracts, Vol. 6, Sec. 1929 A, pp. 5399-5400 (Rev. ed. 1938); see also, Sturges, Commercial Arbitrations and Awards, pp. 787-793 (1930).

²⁸ Wilko v. Swan, 346 U. S. 427, 436-437; see also United States v. Farragut, 89 U. S. 406, 420 ("manifest mistake of law"); Evans v. Hudson Coal Co., 165 F.2d (footnote continued on page 60)

the tenor of the agreement it purports to interpret that it is in excess²⁹ of the power conferred on the arbitrators; it is against public policy;³⁰ or the arbitrators so imperfectly executed their powers that the award³¹ fails to constitute a determination of the matter submitted to them. See generally, Marceron v. Chevy Chase Services, Inc., 258 F.2d 155, 158-159 (C. A. D. C.). We now show, upon an analysis of the opinion upon which its award is based, that the award of the majority of the Board of Arbitration in this case suffers from the basic vices which require its vacation.

1. The first ground upon which the majority of the Board of Arbitration based its conclusion is that Appellant Brawner had not been discharged because the Company had expressed its willingness to reemploy her "if she could prevail on the government officials to restore her security badge" (J. A. 75).

This purported basis of decision is in manifest disregard of fact and law; and is irrelevant even if accepted. It is admitted now, as it was at the arbitration hearing, that from November 15, 1956, Appellant Brawner "no longer worked for the Company. From that day forward she has received no wages or other benefits from the Company" (supra, p. 8). It is further admitted, now as then, that the Company acted pursuant to Section 5(b)(iii) of the Concessionaire Agreement by which it promised not to "engage, or continue to engage, for operations under this Agreement, personnel who fail to meet the security requirements . . . under applicable regulations of the Activity as determined by the Security Officer of the Activity" (supra, p. 5, emphasis added).

(footnote continued from preceding page)

970, 974 (C. A. 3) (an award must be "in accordance with the provisions of the Fair Labor Standards Act or any other applicable statute"); Sturges, Commercial Arbitrations and Awards, pp. 793-798 (1930).

²⁹ Western Union Tel. Co. v. A. C. A., 299 N. Y. 177, 86 N. E. 2d 162; Black v. Cutter Laboratories, 43 Cal. 2d 788, 278 P. 2d 905, aff'd. 351 U. S. 292.

³⁰ See preceding note.

³¹ See preceding notes.

It defies reason to say that Appellant Brawner was not discharged. She no longer works for the Company; she no longer receives wages or other benefits from the Company; and this state of ~~affairs~~ was brought about because the Company complied with the request not to "continue to engage" her. What else was she but discharged? "Discharge normally means termination of the employment relationship or loss of a position." Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 286; see also, Anderson v. Twin City Rapid Transit Co., 84 N. W. 2d 593, 598 (Minn.), and cases cited. That is what happened to Brawner. The employment relationship was terminated; she lost her position. And the Company's expression of willingness to rehire Brawner if in the future she could secure an identification badge confirms rather than negatives her effective present discharge.

But not only is the majority's view totally devoid of support in fact, law, or reason; it is irrelevant even if accepted. For if Brawner were not discharged, she certainly was suspended. And Section 6 of the collective bargaining agreement requires the Company "not to suspend or discharge any employee without good and sufficient cause" (J. A. 19, emphasis supplied). Thus precisely the same question must be answered whether Appellant Brawner was discharged or suspended, and certain it is that she is in one or the other of the two categories.

The first basis for decision by the majority of the Board of Arbitration is thus incapable of rational acceptance.

2. The second basis for the majority's decision is that "the Union must have been aware of the courses which were open to secure an official explanation as to why the employee had been denied security clearance" (J. A. 76).

This statement passes understanding. The Union sought and was denied a meeting by the Superintendent of the Naval Gun Factory upon the ground "that the meeting proposed... would serve no useful purpose and is therefore unnecessary" (supra, p. 11). The Union's attorney sought an explanation and was informed by the Superintendent only that "It was

determined that Mrs. Rachel Brawner did not meet the basic requirements and thus her pass was revoked" (supra, p.13). The Chairman of the Board of Arbitration, one of the majority, observed at the arbitration hearing that "despite efforts by the Union, and by the Union counsel, to this day she has not been told what the charge is against her" (J. A. 70).

The apparent implication that the Union should have, but did not, exhaust available avenues of recourse is thus incapable of rational acceptance.

3. The last ground of decision is as baseless as the first two. The majority stated that the Union's action in invoking the arbitral machinery of the agreement, the very procedure prescribed by its terms, was an "unrealistic approach"; "The real grievance of the employee and her Union has never been against the Company; it has been and is against those who have (wrongfully, she contends) denied her physical access to the place of her employment" (J. A. 76).

This basis of decision is, if anything, the least defensible of the three. It constitutes, not a determination of the dispute submitted to it, but a refusal by the majority to adjudicate it. The Board of Arbitration was created pursuant to the collective bargaining agreement to decide a single question: whether the Company discharged or suspended Rachel Brawner without good and sufficient cause. To establish that its action was with "good and sufficient cause", the Company defended that it was acting in compliance with the demand of the Security Officer pursuant to Section 5(b)(iii) of the Concessionaire Agreement. This defense required the Board to decide three things at a minimum: (1) whether the Security Officer had valid authority to make the demand; (2) in connection with the question of valid authority, the status of Section 5(b)(iii) of the Concessionaire Agreement vis a vis Section 6 of the collective bargaining agreement; and (3) if the demand of the Security Officer was not supported by valid authority, whether the action of the Company in complying with it nevertheless constituted "good and sufficient cause" for Brawner's suspension or discharge.

The majority of the Board decided none of the questions with which it was necessarily presented. It is not simply that it erred in its determination; it refused to make any determination at all. It stated, instead, that the Union's action in invoking arbitration was "unrealistic", and that the Union should not proceed, by the very arbitral process provided by the agreement, against the Company for effecting Brawner's separation, but should proceed, in some other way, against the governmental officers for causing her discharge. And by this refusal to decide the dispute submitted to it, the majority of the Board overthrew hundreds of years of settled law that the liability of the person who commits the wrong (the Company in discharging or suspending Brawner) subsists although the person who induced its commission (the governmental officers who requested her separation) are also liable for the harm inflicted (supra, p. 57).

The refusal of the majority of the Board in this case to decide the dispute on its merits is illuminatingly revealed by contrasting it with the determination of a different Board of Arbitration in a virtually identical case. The Union introduced before the Board of Arbitration the opinion and award in National Food Corporation, reported at 24 Labor Arbitration Reports 567 (J. A. 13-14, 91). In that case, pursuant to the request of the Director of Security Division, Office of the Secretary of Defense, relayed to the employer by the Department of Defense Concessions Committee, the employer, National Food Corporation, discharged an employee, Esther Mae Thompson, who worked in a cafeteria within the Pentagon operated by the employer, the ground for the discharge being the determination by the Director of Security Division that Thompson's security status was in question (ibid.). The Board of Arbitration held that Thompson's discharge was without "sufficient cause," and it ordered her reinstated with back pay (ibid.). In reaching this conclusion, the Board of Arbitration reasoned inter alia that (J. A. 13-14, 24 Lab. Arb. Rep. at 572):

The Company contends that this Board of Arbitration is without power to review the determination of the Director of Security Division, Office of the Secretary of Defense, that Thompson was a security risk. This contention would be relevant if the Director were authorized to determine that an employee in Thompson's class was a security risk and to request the employee's discharge upon such determination. But the Company has not shown, and our independent search has not uncovered, any statute, executive order, or regulation authorizing the Director to act in the premises. The Company concedes that neither the Industrial Personnel and Facility Security Clearance Program, applicable to nongovernmental employees with access to classified information, nor the security requirements for government employment, applicable to government employees, have any relevance to an employee in Thompson's position. Not only do these programs not confer any authority on the Director with respect to an employee in Thompson's position, but by not conferring any such authority they negate the existence of the authority assumed by the Director. It is significant that the very safeguards accorded nongovernmental employees with access to classified information or accorded governmental employees by these programs would have prevented just the summary action to which Thompson, a nongovernmental employee with no access to classified information, was subjected. (Emphasis in original.)

Following this award, Thompson was reinstated, with back pay, and she continues to date to work in the cafeteria in the Pentagon (J. A. 13-14, 52-53, 91).

Thus, the approach which the majority of the Board in this case stated was "unrealistic" brought about complete relief when another Board, instead of declining to decide the dispute, acted in accordance with its commission. And had the present Board rendered an arbitral award of reinstatement with back pay, and had the Superintendent of the Naval Gun Factory remained adamant in his refusal to grant Rachel Brawner access to the grounds, the award would have been enforceable. An action would have been brought in the District Court for an order compelling compliance with the award, and the Secretary of the Defense and his subordinates would have been joined as defendants in that action to secure against them an order requiring them to desist from interfering with the Company's compliance with the award. The governmental

officers might have disregarded an arbitral award, but they could not ignore a judgment of the District Court. By refusing to decide the merits of the dispute, the majority of the Board has simply changed the procedure from one to confirm an award into one to vacate an award.

In sum, the bases of decision of the majority of the Board are incapable of rational acceptance. They constitute, not an adjudication of the merits, but a refusal to decide. The award therefore does not stand as a barrier to vindication of the Company's underlying promise not to suspend or discharge employees without good and sufficient cause.³²

CONCLUSION

For the reasons stated, the order of the District Court should be reversed, and the case remanded with instructions to enter a judgment as prayed in the complaint, with the modifications noted in the margin.³³

Respectfully submitted,

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November 1958

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³² Since the Company has ceased to operate the cafeterias at the Naval Gun Factory (*supra*, p. 14), an order requiring it to reinstate Appellant Brawner to her former position is no longer appropriate, but the Company still remains liable to her for the loss of pay she sustained as the result of her unlawful separation from employment.

³³ As a result of the Company's cessation of operation of the cafeterias on January 31, 1958, and Inplant's assumption of operation of the cafeterias on February 1, 1958 (*supra*, p. 14), the following modifications in the judgment prayed for should be made: (1) In paragraph 2 (J. A. 16), the reference to M & M Restaurants, Inc., should be deleted and there should be substituted "Inplant Foods Incorporated, or any successor employer who operates the cafeterias at the Naval Gun Factory"; and (2) in paragraph 3 (J. A. 17), the reinstatement requirement should be deleted (but not the make whole requirement).

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